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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. IANNELLI, ANTHONY CANCILLA, ALBERT CAMMARATA, ALBERT DIULUS, MAURICE ORLANSKY, PHILIP SCOLIERI, WILLIAM C. FUSARO, NICHOLAS GOBOS, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 4, 1973.

CITATIONS TO OPINIONS BELOW

The district court's opinion denying motions to suppress evidence and to dismiss the indictment is reported at 339 F. Supp. 171 and is reprinted in Ap-

pendix A, *infra*. The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix B hereto, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1973. A timely petition for rehearing was filed and was denied June 6, 1973 (Appendix C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the authorization and identification procedures followed by the Department of Justice in this case were sufficient to comply with Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 and whether the evidence obtained by wiretap should have been suppressed.

2. Whether petitioners' convictions of conspiracy represent a duplication of their convictions of violating 18 U.S.C. 1955 and require that the conspiracy convictions be reversed.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix D, infra.

STATEMENT OF THE CASE

The defendants in this case were charged with various violations of federal laws relating to illegal gambling activities; they were all convicted of conspiracy to violate 18 U.S.C. 1955 and of the substantive offence of violating 18 U.S.C. 1955. The facts relevant to this petition are as follows:

On October 19, 1970 Senior District Judge Wallace S. Gourley, sitting in Pittsburgh, Pennsylvania, upon submission of an application and affidavit to him by John M. Elias, an attorney for the Department of Justice, authorized the interception of incoming and outgoing calls at the residence of Robert and Dolores Iannelli. (52A)* The application was purported to have been authorized by Will Wilson, Assistant Attorney General for the Criminal Division of the Department of Justice and was accompanied by a letter which purported to bear his signature. (39A, 52A)

Motions to suppress were filed as well as a motion to compel admissions. (82A, 85A, 102A) In the course of the pretrial discovery and motion procedure it was disclosed that Will Wilson did not sign the letter of authorization nor did he ever review the file. (112A) Affidavits were submitted by Sol Lindenbaum and Henry Peterson which disclosed that the letter was actually signed by Henry Peterson, an assistant to Mr. Wilson. (121A) The affidavit of Mr. Lindenbaum indicated that the then Attorney General, John Mitchell, had personally authorized the application. (109A) A copy of a memorandum from Mitchell to Wilson allegedly bearing Mitchell's initials was produced with Lindenbaum's affidavit. (111A) By this memorandum Mitchell designated Will Wilson to authorize the application.

Because of the paucity of facts contained in the affidavits and the failure of the Attorney General to submit an affidavit in this case, defendants requested and were granted permission to depose Mr. Lindenbaum. Mr. Lindenbaum's deposition disclosed that he

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* These references are to the Appendix in the Court of Appeals.

had never seen the Attorney General initial the memo and that he actually did not know who placed the initials on the memo. (407A, 411A) The district court refused to suppress on the assumption that the Attorney General had personally initialed the memo. (435A) At no time up to the present has the Justice Department offered to submit an affidavit from Mr. Mitchell.

The evidence gained by the wire interceptions was utilized at the trial and tended to show that the defendants were engaged in a large scale sports betting operation. All of the petitioners here were convicted and received substantial prison sentences and fines.

REASONS FOR GRANTING THE WRIT

1. The question presented here with respect to the authorization and identification procedures utilized by the Department of Justice is identical to that posed by *United States* v. *Chavez,* No. 72-1319, certiorari granted May 22, 1973. The question posed here is also similar to the question posed in *United States* v. *Giordano,* No. 72-1057, certiorari granted March 26, 1973.

The only factual distinctions between the instant case and *United States* v. *Chavez* are that in *Chavez* there were two taps, one personally authorized by Attorney General Mitchell and the second authorized by Sol Lindenbaum, his Executive Assistant. The first tap in *Chavez* was suppressed because of misidentification and the second was suppressed because of improper authorization. In the instant case there was only one tap in which the authorizing officer was clearly misidentified. Whether the application in this case was authorized personally by the Attorney General is

not known, in point of fact, the record does not disclose who authorized it. Thus the interesting question is raised as to whether mere assumptions may be substituted for proof. In this respect the present case is factually similar to the case of *Fiorella* v. *United States,* 468 F.2d 688, petition for a writ of certiorari pending, No. 72-5278.

Thus since all of the policy reasons which prompted the grant of certiorari in *Chavez,* supra, and *Giorando,* supra, are applicable to this case as well, we respectfully request that certiorari be granted here, or in the alternative, that disposition of this petition be held in abeyance until *Chavez* and *Giordano* have been decided on their merits.

2. Petitioners contend here, as they did in the district court and in the circuit court, that the conspiracy merged with the substantive count under the doctrine commonly known as Wharton's Rule. The Rule states:

> "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." *Anderson, 1 Wharton's Criminal Law and Procedure,* Sec. 89, P. 191 (1957).

The courts which have recently had occasion to rule on this issue, in the context of a 1955 prosecution, have taken conflicting views. We urge this Court to resolve the conflict.

The Circuit Court, in this case, citing *U.S.* v. *Becker,* 461 F. 2d 230 (2d Cir. 1972), held that Wharton's Rule was inapplicable. An exception to Wharton's Rule, known as the "third person" exception, is the basis of the *Becker* opinion. This exception limits

Wharton's Rule to those cases where the essential participants are the only conspirators. Accordingly, when "third persons" are added all may be convicted of conspiracy. Thus, in *Becker,* as in the instant case, the court held Wharton's Rule inapplicable because more than five persons were charged with commission of the substantive offense, 18 U.S.C. 1955.

Two District Courts taking an opposing view are Ohio and Florida. See *U. S.* v. *Greenberg,* 334 F. Supp. 1092 (N.D. Ohio 1971) and *U. S.* v. *Figueredo,* 350 F. Supp. 1031 (M.D. Fla. 1972) *Notice of Appeal Filed,* December 9, 1972. (As of this date argument has not yet been scheduled) The Court in *Figueredo* found the reasoning in *Becker* to be erroneous and declined to follow it.

In *Figueredo,* the court analyzed the cases relied upon by *Becker* and concluded that while those cases were examples of the third party exception, *Becker* was not. The exception only applies when the third party cannot be convicted of the substantive offense. An example cited in *Figueredo* is *State* v. *Clemson,* 123 Iowa 524, 99 N. W. 139. There, when a third person conspired with a man and a woman for the commission of adultery by the latter two, all three were properly convicted of conspiracy. However, in the instant case, the "extra defendants" (a total of thirteen defendants were indicted) could be found guilty of the substantive charge, unlike the adultery "matchmaker" in the *Clemson* case.

Becker thus rests upon a mistaken interpretation of the third party exception. *Becker* implies "... that the mere number charged in the indictment takes on a

talismanic quality which obviates the application of the Rule. It is not, however, the mere number charged, but rather the nature of the 'extra' defendants, which determines the result in the individual case." *U. S.* v. *Figueredo, Supra,* at 1035.

Moreover, under *Becker,* Wharton's Rule may be neatly sidestepped by the prosecutorial expediency of charging more than five persons with both the substantive crime and the conspiracy to violate it. *U. S.* v. *Figueredo, Supra,* at 1034.

In the circuit, the Government argued that Wharton's Rule was inapplicable because the "five or more persons" requirement of Section 1955 is merely a jurisdictional requirement and is therefore logically no part of the crime itself. The same argument was advanced by the Government, and rejected, in the *Figueredo* case:

> "But the element of proof in the Government's case would be that five or more persons were involved in the gambling business. Thus, group activity is a necessary element of the offense. The Government admits that this is not a crime for which a 'sole proprietor' of a local bookie operation could be found guilty. This court realizes that the five-person requirement was placed in the statute to bring the activity within federal cognizance. Once put in the statute, however, this 'jurisdictional' element makes the crime one of group activity. A group conspiracy is a logical and necessary prerequisite to commission of the substantive offense by any one of the defendants. To then charge the same group with conspiracy is the result to which Wharton's Rule directs itself." Id. at 1036.

The Government also contended that even if Wharton's Rule was applicable, the only relief to which petitioners were entitled was invocation of the merger doctrine at the time of sentencing. However, where Wharton's Rule is applicable, conspiracy cannot in the first instance be charged and when charged it must be dismissed. *U. S.* v. *Figueredo, Supra.*

The Government's final argument was that Wharton's Rule should be rejected as archaic. However, the rule is viable today because it continues to serve an important function. When conspiracy is an inherent element of the substantive offense, it should not be made an additional crime. To do so would be grossly improper.

The Court, in *U. S.* v. *Figueredo, Supra,* at 1033, reflected upon the importance of Wharton's Rule:

> "Conspiracy is a crime with common law roots and with an unpopular background. See Sayre, *Criminal Conspiracy,* 35 *Harv. L. Rev.* 393. Justice Jackson once commented upon the concept of conspiracy as a separate crime:
>
> > 'The looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case. *Krulewitch* v. *U. S.*, 336 U. S. 440, 449 (1949) (Jackson, J. concurring).'
>
> "The Supreme Court has indicated that it will view with disfavor attempts to broaden the scope of conspiracy prosecutions. *Grunewald* v. *U. S.,* 391 (1957). When seen in this context, Wharton's Rule presents itself as a logical limitation on the use of conspiracy charges by prosecutors."

The question presented is important because of the frequency with which the Government joins counts of conspiracy and 1955 in the same indictment. We, therefore, respectfully urge this Court to resolve the conflict which presently exists in the lower courts, and to ultimately decide that Wharton's Rule requires that petitioners' conspiracy convictions be reversed.

CONCLUSION

It is respectfully submitted that certiorari should be granted as to the first point raised in this petition because a grant in this case would result in a determination of the sufficiency of proof of proper authorization. This important question does not arise in *Chavez* or *Giordano* and a final determination of that question is of great practical importance.

Because of the conflict in the courts and the frequency of the problem a final determination of the applicability and viability of Wharton's Rule to these cases is also of great practical importance, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE UNITED STATES OF AMERICA, *Plaintiff*,

v.

ROBERT ELIA IANNELLI ET AL., *Defendants*

Crim. No. 71-062

United States District Court
W.D. Pennsylvania

Feb. 16, 1972.

* * * * * * * * * * *

OPINION

WEIS, District Judge.

This case presents an illustration of the many complexities involved in the legislation enacted by Congress in recent years in effects to combat organized crime.

The defendants have been indicted for conspiracy and violations of various gambling statutes of the United States. Much of the evidence which the Government intends to produce consists of facts uncovered by the use of a court authorized wiretap on telephones at the Iannelli residence located in one of the suburbs of Pittsburgh, Pennsylvania.

An evidentiary hearing has been held and a transcript of the telephone conversations overheard, as well as a copy of the tape recording, have been furnished to defense counsel.

The defendants have filed a plethora of pretrial motions—they allege:

1. The statute authorizing wiretapping, 18 U.S.C. § 2510 et seq., is unconstitutional;

2. The request for the court order for intercepting telephone communications was not properly authorized;

3. There were illegal disclosures of the contents of intercepted telephone conversations;

4. The FBI utilized an unauthorized wiretap;

5. An order of utilization under 18 U.S.C. §2517 was secured by misrepresentation;

6. The application for the interception order was tainted by a prior illegal tap;

7. That 18 U.S.C. § 1955, a gambling statute, is unconstitutional;

8. That searches of premises owned by various defendants were based upon inadequate cause;

9. That the conspiracy count represents duplication of the offenses outlawed by 18 U.S.C. § 1955 and, hence, should be dismissed;

10. That bills of particulars and discovery should be ordered.

1.

[1] The constitionality of the wire-tapping statute has already been passed upon by this court and nothing further need be said on that subject at this time. *See,* United States v. LaGorga, 336 F. Supp. 190 (W.D.Pa.1971). The same considerations, however, with respect to irrelevant calls prevail in this case as in the *LaGorga* matter and the same provisions will apply to prevent further dissemination of the irrelevant materiaal contained in the phone conversations, that is, an order impounding the nondiscriminatory interceptions to preserve privacy.

[2] Defendants Albert Cammarata, Frances Cammarata, Louise Faiella, Anthony Cancilla and Steve Bruno contend that the failure to serve an inventory upon them requires suppression of the evidence. However, we note that the statute[1] does not require that a notice be served

[1] 18 U.S.C. § 2518(8) (d).

upon each person whose calls have been intercepted. It is sufficient if an inventory is served upon the individual named in the application and such other persons as the judge may determine in his direction. *Cf.* ABA Standards on Electronic Surveillance, § 5.15.

The purpose of this particular provision is to prevent the Government from carrying on a continuing surveillance without alerting those who would be the subject of the interceptions. In all, inventories were sent to some twenty-one persons, including eight of the named defendants. This is adequate coverage to effect the result intended by the Act. In any event it seems likely that Bruno and the others became aware of the intercept in this case when their acquaintances were served.

2.

[3] Defendants assert that the Government failed to secure the authorization required by 18 U.S.C. § 2516(1) in that the letter attached to the application purportedly signed by Will Wilson, an Assistant Attorney General, was in fact never read, signed, dictated or approved by him. However, the prosecution contends that a memorandum issued by the Attorney General, and initialed by him, constitutes sufficient authorization within the terms of the statute. A similar situation prevailed in the LaGorga case where a like memorandum was held sufficient. We hold to the same effect in this case.[2]

This case is different from United States v. Cihal, 366 F.Supp. 261 (W.D.Pa.1972), where neither the Attorney General nor an Assistant Attorney General ever authorized the wiretap. In the *Cihal* case the only person who

[2] The deposition of Sol Lindenbaum, the Executive Assistant to the Attorney General was taken on January 14, 1972 pursuant to order of court. Mr. Lindenbaum confirmed that the initials on the memorandum of October 14, 1970 were those of the Attorney General and had been placed thereby Mr. Mitchell.

authorized the interception was the Executive Assistant to the Attorney General, a person not empowered by the terms of the Act to direct the use of wiretapping and consequently the court ordered suppression.

In United States v. Aquino, 338 F.Supp. 1080 (E.D. Mich.1972), the United States District Court for the Eastern District of Michigan sustained an order for an original wiretap but ordered suppression of the extension. The original interception was found to be within the law when a memorandum initialed by the Attorney General formed part of the request for application. The extension, however, did not contain such authorization and it appeared that again only the Executive Assistant to the Attorney General had passed on the application.

Similarly, in United States v. Robinson, (5th Cir. 1/12/72), 40 L.W. 2454, suppression was ordered when there was evidence that the Executive Assistant to the Attorney General alone had authorized the application.

This is not a *Cihal* or *Robinson* case; this is a siuation similar to *LaGorga* and the original tap in *Aquino*. We therefore find adequate compliance with 18 U.S.C. § 2516(1).

3.

Defendants claim, further, that there was unauthorized disclosure of the material received in the tap, particularly to the Internal Revenue Service and to the news media.

In April or May of 1971, Special Agent Edward Zelik of the Intelligence Division of the Internal Revenue Service was permitted to listen to the tape recordings of the intercepts. He compiled estimates of wagers received by the Iannellis and turned this information over to Revenue Agent Stanley Giarrussi assigned to the Excise Tax Group.

Acting on the basis of the data given to Giarrussi, IRS made wagering tax assessments against the Iannellis and later liened all their property.

It appears that similar disclosures were made to the IRS with respect to some of the other defendants.

No court order authorized by 18 U.S.C. § 2517(5)[3] was secured before this material was made available to the Excise Tax group.

The statute provides in § 2517(1) that wiretap information may be divulged to another investigative or law enforcement officer. Section 2510(7) defines "investigative or law enforcement officer" as one ". . . who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses."

[4] The defense argues strenuously that these provisions do not authorize disclosure to personnel of the Internal Revenue Service. Without passing upon the merits of this contention at this time, we hold simply that even if such a violation occurred, it does not furnish a basis for suppression of evidence in this criminal prosecution. Section 2515 provides that the contents of interceptions

[3] "When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable."

may not be received in evidence if disclosure ". . . would be in violation of this chapter." Section 2518(10) (a) provides for a motion for suppression when (i) the communication was unlawfully intercepted, (ii) the order is insufficient on its face, or (iii) the interception was not made in conformity with the order. Subsequent illegal activity is not listed within these categories.

If it be assumed that the interception initially was lawful, then the use of the evidence in this criminal case would not be "in violation of this chapter."

We do not believe that it was the Congressional intent to avoid an interception *ab initio* if there were some unauthorized disclosure of the information at some later time after an original lawful acquisition of evidence for use in the criminal proceeding which was the basis for the court order in the first instance.

A ruling on the admissibility of evidence forming part of an unauthorized disclosure, if such were sought to be utilized in a tax collection suit, should of course be deferred until raised in that proceeding. It is pertinent also that Congress did provide for the recovery of civil damages for the disclosure, use, or procurement of communications in violation of this chapter. *See* § 2520.

The allegation of unlawful disclosure to the press, however, fails to find sufficient supporting evidence in the record. The Iannellis brought an action in this court on July 8, 1971, requesting that an injunction be entered against the Internal Revenue Service.[4] There were evidentiary hearings in connection with that case and rather detailed pleadings were filed, all of which made data from the wiretaps available to the press in open court. Such disclosure developed in the course of a public hearing does not violate the terms of the statute since it does

[4] Iannelli v. Long, 329 F.Supp. 1241 (W.D. Pa. 1971): Iannelli v. Long, D.C., 333 F.Supp. 407 (W.D.Pa. 1971).

permit testimony about intercepted communications in a Court of the United States.

[5] There is nothing in the record to support the very serious charge that the Government furnished information from the wiretaps to the press other than that which became public during the course of hearings in this and related litigation. Since such alleged misconduct on the part of the prosecution would merit the strongest condemnation, the defendants must produce evidence to support their position. They have not done so.

The motions to suppress based on claims of illegal disclosures are denied.

4.

[6] During the evidentiary hearing on the motions to suppress, a Mrs. Mary Rennebeck testified that a man resembling FBI Agent Harold L. Williams and purporting to be a telephone repairman, visited the Iannelli home on May 29, 1969 and seemingly tested the operation of telephones there. The Iannellis claim that this episode in fact was the occasion for the attachment of an unauthorized and unreported tap on their phones.

We find that the witness' identification testimony was weak and unconvincing and choose instead to credit the direct and unequivocal denial by Agent Williams who said he was not in the Iannelli home at that or any other time under such circumstances. Furthermore, the defendants failed to produce any evidence at all that there had in fact been an illegal wiretap at the Iannelli residence.

5.

[7] Resourceful counsel for the defendants also object to the order dated December 22, 1970, signed by Judge Herbert P. Sorg of this court which permits the use of the wiretap evidence as a basis for prosecution under 18 U.S.C. § 1955.

The original court order authorizing interceptions was based upon an application which alleged, in part, a violation of 18 U.S.C. § 1952 which proscribes the use of facilities in interstate commerce, to carry on gambling activities. Although Judge Wallace S. Gourley signed the order appproving the wiretap on October 19, 1970, it appears that the preparation of the application had taken place in Pittsburgh some weeks before. Thereafter it was sent to Washington, D.C. and then was returned with a letter of approval from the Department of Justice dated October 14, 1970.

On October 15, 1970, the statute prohibiting certain illegal gambling businesses was signed into law and became codified as 18 U.S.C. § 1955.

The petition presented to Judge Sorg in December, 1970, recited the circumstances of the interception order signed by Judge Gourley in October and stated that communications had been overheard which indicated violations of 18 U.S.C. § 1955 as well as 18 U.S.C. § 1952. The petition went on to say:

> "7. At the time of the application of October 19, 1970, agents of the Federal Bureau of Investigation, had no knowledge or indication that offenses other than the transmission of bets and betting information in violation of Title 18, United States Code, Sections 1952, 1084, and 371 were being planned by the use of telephones bearing numbers * * *."

The attorney who prepared the petition did so on the basis of information received from the agents of the FBI and not as a result of any personal knowledge. At the evidentiary hearing, it became apparent that Special Agent Thompson at the time of preparation of the application was aware of *facts* which would later come within the ambit of 18 U.S.C. § 1955. It is obvious that at that time he did not know when, and if, and in what form, the bill which later became 18 U.S.C. § 1955 would be signed into

law. In other words, the facts of which Thompson was aware in early October were not *offenses* against the United States at that time.

With this background, we reject the defense contention that the statement in the application to Judge Sorg was a palpably false representation which should vitiate the order.

Perhaps the petition could have been more precise but we are convinced that a fair reading of the pleading belies the assertion of deliberate falsehood and the facts furnished ample justification for the order.

6.

Since the time of oral argument and filing of briefs in this case, another development has occurred which arguably could come within the terms of the doctrine which for want of better nomenclature has been given the hackneyed and "time-worn" metaphor of "fruit of the poisonous tree."

The affidavit in support of the application for interception, which was filed before Judge Gourley, included some detailed information about Robert Iannelli's gambling activities secured from confidential informants as well as from electronic surveillance of telephones owned by one Jack Frangis, one Andrew Marmo, and one William Cihal. Each of these wiretaps had been authorized by a separate court order.

The Frangis wiretap was sustained against the attack of illegality and unconstitutionality.[5] However, the tap on the phone of William Cihal has been held to be in violation of the statute.[6]

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[5] United States v. LaGorga, supra.

[6] Ante, p. 174.

The fact that part of the data which was offered in support of the application was a product of an illegal electronic surveillance gives rise to the question of whether the affidavit of probable cauuse involved in this case is so tainted as to require suppression of the evidence. The *Cihal* case is presently on appeal but we prefer to determine this question as if the order of suppression in that case were final.

[8] First, as to the matter of standing, we conclude that Robert Iannelli, whose voice was intercepted on the Cihal phone, would have standing to move for suppression. Title 18 U.S.C. § 2510 (11) defines "aggrieved person" as one who was a party to any intercepted wire or oral communication or a person against whom the interception was directed .*See also,* Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1968).

None of the other defendants is mentioned in the affidavit as having had any conversations with Cihal during the period of his intercept and therefore would not have standing to raise the issue of suppression of the Iannelli wiretap.

Having found, therefore, that one of the defendants has standing, we go forward to determine whether the affidavit for probable cause was so contaminated as to mandate suppression of the results of the intercept.

In the case of Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968), Mr. Justice White wrote:

> "The doctrine that the 'fruits' of illegally obtained evidence cannot be used to convict the defendant is complex and elusive. There are many unsettled questions under it." (Page 230, 88 S.Ct. page 2014)

A review of the literature and case law on the doctrine leads one to the belief that Justice White's comment was, at the least, an understatement.

The "fruit" and the "poisonous tree" depend for nourishment upon the soil of the exclusionary rule. This "ground" rule itself, however, has been subjected to probing examination in recent years, sprouting beneficial results have failed to ripen into reality. *See* dissenting opinion of The Chief Justice in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411, 91 S.Ct. 1999, 29 L.Ed.2. 619 (1971); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970). The justification for the exclusionary rule rests on the questionable theory that it deters unlawful police conduct and on the premise that the loss of otherwise valid evidence is not too high a price to pay when the Government relies on its own illegal conduct for successful prosecutions.

In Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920) in speaking of an illegal seizure, Mr. Justice Holmes said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely Court but that it shall not be used at all." (Page 392, 40 S.Ct. page 183)

That Justice Holmes recognized that this was not to be an all inclusive statement is evident from the following sentence where he said:

> "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." (Page 392, 40 S.Ct. page 183)

In understanding the rationale of this case, also, it is essential to read the preceding portion of the opinion where the court said:

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its

right to avail itself of the knowledge obtained by *that means which otherwise it would not have had.*" (emphasis supplied (Page 391, 40 S.Ct. page 182)).

In discussing the "independent source" referred to in *Silverthorne*, the Court in Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307, said:

> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a casual connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purpose of the criminal law—ought to be within the reach of experienced trial judges."

The leading case of Wong Sun v. United States, 371 U.S. 471, 487, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1962) in explaining the doctrine reads:

> "We need not hold that all evidence be 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

Alderman v. United States, supra, came to the Supreme Court in 1968. In discussing the question of standing to attack an illegal wiretap, the Court made the following comment by way of illustration:

> "If the police make an unwarranted search of a house and seize tangible property belonging to third parties—even a transcript of a third party conversation—the homeowner may object to its use against him, not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment. Nothing seen or found on the premises may legally form the basis for an arrest or search warrant or for testimony at the homeowner's trial, since the prosecution would be using the fruits of a Fourth Amendment violation." (394 U.S. page 176, 89 S.Ct. page 968)

This language is quite broad and might seem to require suppression in the case at bar. However, we think it must be read in the light of the preceding cases, that is, *Silverthorne*, *Nardone*, and *Wong Sun*, because *Alderman* does not purport to expand the "exclusionary-tainted evidence" rule.

Then Judge Burger in Harried v. United States, 128 U.S. App.D.C. 330, 389 F.2d 281, 286 (1967) said:

> "From its inception, the 'fruit of the poisonous tree' doctrine has not applied where the information was also obtained from an 'independent' source."

In this Circuit we have the case of United States v. Sterling, 369 F.2d 799, 802 (3rd Cir. 1966), where the Court unequivocally said:

> "Nevertheless, the law is quite clear that the inclusion of illegally obtained evidence does not vitiate a search warrant which is otherwise validly issued upon probable cause reflected in the affidavit and based upon proper sources."

In agreement is James v. United States, 135 U.S.App.D.C. 314, 418 F.2d 1150, 1152 (1969), decided after *Alderman:*

> "If the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant, apart from the tainted information, the evidence seized pursuant to the warrant is admitted."

Accord, Howell v. Cupp, 427 F.2d 36 (9th Cir. 1970).

For some valuable commentary on the subject, *see* Fruit of the Poisonous Tree—A Plea For Relevant Criteria, 115 U.Pa.L.Rev. 1136 (1967); Maguire, How to Unpoison the Fruit—The Fourth Amendment and Exclusionary Rule, 55 J.Crim.L.C. & P.S., 307 (1964)

The American Law Institute in its tentative draft of a model pre-arraignment proposes as follows:

> "(3) *Fruits of Prior Unlawful Search.* If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to a motion to suppress under subsection (1), and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this Code." Ali, Model Code of Pre-Arraignment Procedure, §§ SS 8.02 (2), (3), p. 24 (Tent.Draft No. 4, 1971).

[9] To sum up, if the tainted evidence may be excised from the affidavit and that remaining still constitutes probable cause, then the results of the intercept order should not be suppressed.

[10] We have reviewed the affidavit and conclude that ample probable cause is established by the information secured from confidential sources, from the Frangis wiretap, and from the Marmo wiretap. The references to the *Cihal* intercept do little more than amplify and may fairly be clasified as cumulative.

[11] An evidentiary hearing on the extent of the taint is not required since the affidavit clearly spells out the data which was secured from the *Cihal* tap and supplied to the Court. Therefore, a review of the complete transcript of the

Cihal interception is not necessary because we are concerned with the report that was presented to the judge who signed the order, not with what might have been in the minds of the agents who applied for the intercept. In this Circuit, at least, it is the contents of the affidavit and not unrecorded and unsworn statements to the magistrate which control the determination of probable cause. *See* United States v. Sterling, supra.

One other point should be made. There is no doubt that the agent who prepared the affidavit and the attorney who drew up the application for the Iannelli tap felt that the *Cihal* interception had been legally secured by a valid court order. It was more than a year later before any question was raised about the authorization from the Attorney General in the *Cihal* case. To order the drastic sanction of exclusion here would be a blind application of the rule without respect for the purpose for which it was formulated.

The "unlawful" police conduct and the "deterrent effect" which would justify the withholding of relevant and credible evidence are questionable indeed in the factual setting of the case *sub judice.*

We conclude, therefore, that the evidence secured from the Iannelli interceptions should not be suppressed.

7.

The attack upon the constitutionality of 18 U.S.C. § 1955 is answered by the decision of the court for the Eastern District of Michigan in United States v. Aquina, supra. In sustaining the legislation, the court pointed out that the argument that Congress had overreached its authority under the commerce clause of the Constitution, Article I, § 8, Clause 3, had been rebuffed by the Supreme Court in Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971). The *Perez* case was concerned with intrastate loan sharking activities which actually appear less likely to

affect interstate commerce than the gambling activity involved in the case at bar.

[12] Congress has determined that an illegal gambling business involving five or more persons and with gross revenue of $2,000 a day or more or which has been in operation for a period of more than thirty days represents activity by organized crime which should be subject to prohibition by the national government. While the Supreme Court has yet to pass upon this exercise of legislative power, its holding in the *Perez* case leads us to believe that the same reasoning must apply to the gambling statute as was applied to the loan sharking situation. We therefore hold that 18 U.S.C. § 1955 is constitutional.

8.

The motions to suppress evidence received as a result of the searches of homes of several of the defendants are based upon two main contentions; first, that no probable cause was shown and, second, that the documents received were testimonial in nature and that even if the requirements of the Fourth Amendment have been met, the Fifth Amendment has been violated.

Both the Government and the defendants concede that if the evidence received from the Iannelli wiretap complies with appropriate standards, then the affidavits for the search warrants would be adequate. Since we have already found tht the wiretap did comply with statutory and constitutional requirements, probable cause did, in fact, exist for the issuance of search warrants.

[13] In support of their motion to suppress on the theory that the material was testimonial in nature, the defendants cite Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971), and United States v. Blank, 330 F.Supp. 783 (N.D. Ohio 1971). In the *Philpott* case, the Court of Appeals, with one judge dissenting, held that the Fifth Amendment was violated in

a search of a physician's office which resulted in a seizure of several truckloads of ledgers, appointment books, receipt books, etc. in connection with a criminal prosecution for income tax evasion. In the *Blank* case, the search was for the records of a defendant involved in gambling. The Court suppressed the evidence citing the *Philpott* case as authority.

The Supreme Court in Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) made clear that it no longer would prohibit a search for that which previously had been considered as "mere evidence." In that case, however, it did footnote an observation that there might be some things which by their very nature could not be seized. Just what might fall in that category has caused some uncertainty and concern in the lower courts. Nevertheless, it appears that the net effect of the *Hayden* case was to broaden the scope of the type of material which could be the subject of a search rather than to narrow it.[7]

The seizure of gambling paraphernalia, including such things as numbers slips, diaries, lists of names, receipts, etc. has been sustained in a number of cases. *See* United States v. Hanon, 428 F.2d 101 (8th Cir. 1970), cert. denied 402 U.S. 952, 91 S.Ct. 1608, 29 L.Ed.2d 122, and while the Fifth Amendment contention was not precisely raised in United States v. Sigal, 341 F.2d 837 (3rd Cir. 1965), cert. denied, 382 U.S. 811, 86 S.Ct. 23, 15 L.Ed.2d 60, the Court of Appeals of this Circuit did allow seizure of records similar to those involved in the case at bar.

We conclude that the *Hayden* case would not invalidate searches for materials which had been previously approved by various courts. *See also,* United States v. Bennett, 409 F.2d 888 (2d Cir. 1969) cert. denied sub nom.; Jessup v. United States, 396 U.S. 852, 90 S.Ct. 117, 24 L.Ed.2d 101; *Cf.* United States v. Scharfman, 448 F.2d 1352 (2d Cir.

[7] *See* 18 U.S.C. § 3103a which embodies the holding of the *Hayden* decision.

1971). *See also,* United States v. Main, 312 F.Supp. 736 (D.C.Del.1970).

The rationale of the *Blank* case is that the records speak against the defendant just as clearly as if he were on the witness stand testifying. However, it is quite clear that there is a distinction between the situation where a person is forced to testify and incriminate himself and the circumstance where records which the defendant prepared at an earlier time under no duress or coercion are used as evidence against him. The Supreme Court in the cases of United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed. 2d 453 (1971) and Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963), permitted the introduction into evidence of recordings of statements made to a third party by a defendant under the belief that his confidence would not be violated. In both instances it developed that the third party was a Government agent or informer.

It is not difficult to appreciate the similarity between voluntarily maintaining records in the operation of an illegal business or criminal activity in the expectation that they would not be divulged and making incriminating statements to a third party under the same mistaken impression. In neither case is the element of compulsion present and both represent what has been termed as being within an assumption of risk.[8] This type of documentary evidence is not of a purely personal and private nature.

The motions to suppress as to the material seized at the defendants' homes are denied.

9.

Count 1 of the indictment charges the defendants with conspiracy to mail paraphernalia to be used in bookmaking in violation of 18 U.S.C. § 1302, to carry on unlawful gam-

[8] *See* dissenting opinion of Mr. Justice Brennan in *Lopez*, supra.

bling activity in violation of the laws of Pennsylvania, a violation of § 1952, and to conduct, finance, and own an illegal gambling business in violation of § 1955. The second count charges the defendants with ". . . did knowingly and willfully conduct, finance, manage, supervise, direct, and own an illegal gambling business, such business having a gross revenue of $2,000 or more on one or more single days, involving five or more persons in its conduct, financing, management, supervision, direction and ownership . ."

Defendants contend that there is duplicity between the conspiracy count and Count 2 and cite the case of United States v. Greenberg, 334 F.Supp. 1092 (N.D. Ohio 1971), where it was held that a conspiracy to violate § 1955 was dupicitous of a count of an infraction of § 1955.

[14, 15] It is basic that the commission of a substantive offense and a conspiracy to commit such offense are separate and distinct. But here the defendants invoke Wharton's rule[9] which simply stated provides that when the actions of two or more people are necessary to the commission of a certain crime, then that offense may not be indicted as a conspiracy. This exception applies only when the wrongdoing actually is committed and the general principle of separate offenses would be applicable if the underlying crime were not perpetrated.

[16] There are some points of distinction between this case and the *Greenberg* litigation. Here, the conspiracy charge takes into account not only § 1955 but also § 1952. And it would serve little purpose, therefore, to dismiss only part of the count at this stage of the proceeding when we are not certain what facts might be proved at trial with respect to § 1955. Under these circumstances, it would appear that no ruling should be made at this particular time on the objection raised by defendants but that the matter should be reserved for determination at the conclusion of

[9] Wharton, 2 Criminal Law § 1339.

the prosecution's case. This contention, therefore, of the defendants is denied without prejudice to renew it during the trial.

10.

Extensive motions have been filed by all defenants for bill of particulars. The following requests will be granted:

1. The Government shall indicate the day or days on which the illegal gambling business had a gross revenue of $2,000 or more which it intends to prove at the time of trial.
2. The Government shall indicate as to each of the named defendants, the capacity or capacities in which he is alleged to have participated in the illegal gambling business which is a violation of § 1955, that is, whether he conducted, managed, financed, supervised, directed or owned a portion of the business.
3. The Government will furnish a list of all overt acts which it intends to prove at the trial in addition to those listed in the indictments.
4. The Government shall list the names of co-conspirators not named in the indictment who have become known to the Government since the time of the indictment.

Numerous requests for items of discovery have been submitted and it should be noted that more than the usual amount of information has already been furnished to the defendants via the transcripts of the intercepted telephone calls. The United States has also permitted defense counsel to examine all of the material that was seized by virtue of the search warrants.

To the extent to which it has not already been performed, the Government shall:

1. Make available to defense counsel at time of trial the criminal record of each witness it intends to call.
2. Exculpatory material not heretofore disclosed to defendants' counsel shall be produced at pretrial. This material shall include, but not be limited to, names and addresses of witnesses potentially favorable to the defense and presently known to the Government.

All other requests for bill of particulars and discovery are denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 72-1696/72-1703

OPINION OF THE COURT

(Filed May 4, 1973)

GIBBONS, *Circuit Judge.*

The appellants, charged with violations of the federal anti-gambling statutes, and with conspiracy, appeal from sentences imposed after a jury verdict. The Government's case was based in substantial part on evidence obtained through a court-ordered electronic surveillance. Appellants advance these common contentions:

1. That Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, is unconstitutional. We have held otherwise. *United States* v. *Cafero,* 473 F.2d 489 (3d Cir. 1973).

2. That Title VII of the Omnibus Crime Control Act of 1970, 18 U.S.C. § 1955, under which they were charged, is unconstitutional. We have held otherwise. *United States* v. *Ceraso,* 467 F.2d 653, 657-58 (3d Cir. 1972).

3. That the Government did not comply with the authorization requirements of 18 U.S.C. § 2516(1). The record discloses that Attorney General Mitchell approved the application evidencing his approval by initialling a memorandum. We have held that this procedure is sufficient. *United States* v. *Ceraso,* 467 F.2d 647, 649-52 (3d Cir. 1972).

4. That the Justice Department made an unlawful disclosure of intercepted communications when the communications were disclosed to an agent of the Intelligence Division, Internal Revenue Service, and to an agent of the audit branch of the same service working with the Intelli-

gence Division agent. These Intelligence Revenue Service agents are investigative or law enforcement officers within the meaning of 18 U.S.C. § 2510(7) and disclosure was appropriate to the performance of their duties. 18 U.S.C. § 2517(1). In any event the suppression remedy specified in 18 U.S.C. § 2518(10) applies to unlawful interceptions. A civil remedy applies to unlawful disclosures. 18 U.S.C. § 2520.

5. That the authorizing judge abused his authority in permitting continuance of the surveillance, considering the sketchy nature of the progress reports which, in the order authorizing the surveillance, he required. The sufficiency of these reports was a matter for the supervising judge, and the breadth of his discretion must be viewed in light of the fact that he could under 18 U.S.C. § 2518(6) have dispensed with progress reports entirely. *See United States* v. *LaGorga*, 336 F. Supp. 190, 194 (W.D. Pa. 1971). We find no error.

6. That applying "Wharton's Rule" they cannot be convicted both of a conspiracy in violation of 18 U.S.C. § 301 and of a substantive violation of 18 U.S.C. § 1955, because a § 1955 violation requires a minimum of five participants. More than five participants were, however, charged in the indictment. Thus the possible application of "Wharton's Rule" is not presented. *See United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3160 (U.S. July 28, 1972) (72-158); *Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, 956 n. 252 (1959).

7. That there were multiple conspiracies, and *Kotteakos* v. *United States*, 328 U.S. 750 (1946), requires reversal. Our review of the record convinces us that there was sufficient evidence of an overall conspiracy to sustain the verdict. *See Blumenthal* v. *United States*, 322 U.S. 539 (1947); *United States* v. *Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).

8. That the trial judge erred in refusing to charge that each defendant must have knowledge that five or more are participating in the enterprise before there can be a conviction under 18 U.S.C. § 1955. That section prohibits gambling businesses illegal under state law. The number of participants is merely a jurisdictional element, determining when the illegality has a sufficient effect upon interstate commerce. *See United States* v. *Ceraso*, *supra* at 657-58. The jury does not have to find knowledge of such jurisdictional elements in order to convict. *See, e.g., United States v. Roselli*, 432 F.2d 879, 891 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971); *United States* v. *Blassingame*, 427 F.2d 329 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *United States* v. *Miller*, 379 F.2d 483 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967).

9. That an *ex parte* conference between the prosecutor and the trial judge, in which the prosecutor called to the attention of the court the fact that a government witness had lied on the stand, required the grant of a mistrial. The witness in question was put on the stand on the next court day and corrected his testimony. Had the conference never taken place the effect of the initial testimony and the later corrected testimony upon the jury would have been identical. Assuming the *ex parte* conference was improper (as to which we have no occasion to rule, although clearly the circumstances were exigent) it did not prejudice the defendants.

10. That evidence from a pen register, a number recorder and a technowriter, all electromechanical devices used to determine telephone numbers from electrical impulses, was improperly admitted. The extent to which a foundation must be laid for the admission of evidence obtained from using such electromechanical devices is a matter within the trial court's discretion, which in this case was exercised soundly in view of the testimony of the government witnesses. Some of the evidence consisted of secondary logs rather than original magnetic tapes. There

was ample opportunity to cross-examine as to the preparation of the logs. There was no error here. *See* IV Wigmore, *Evidence*, §§ 1193-94.

Appellant Iannelli contends (1) that there was insufficient evidence for the jury to convict him on Count IV, 18 U.S.C. § 1342 and (2) that if we reverse on that count there must be a new trial on all counts because the conviction on these counts was tainted. Mindful that Iannelli could be convicted under Count IV as an aider and abettor, 18 U.S.C. § 2, the evidence on that Count amply meets the test of *Glasser* v. *United States*, 315 U.S. 60 (1942).

Appellants Cancilla and Cammarata contend that they were not served with an inventory of the intercepted communications. 18 U.S.C. § 2518(8)(d). They eventually received actual notice well in advance of the hearing on a motion to suppress. There was no prejudicial error here. *See United States* v. *Cafero, supra; United States* v. *Ripka*, 349 F. Supp. 539 (E.D. Pa. 1972). Appellant Cancilla contends that prejudicial error occurred when an FBI agent mentioned that he had been the subject of a prior gambling investigation. But his attorney opened the door to the testimony in question on cross-examination of the agent and did not, on redirect, object when the question was asked. After a recess, when counsel did finally object, the court gave a proper limiting instruction. There was no error. We have considered and we reject Cancilla's contention that the evidence is insufficient to support his conviction as a participant in the gambling enterprise. We have considered and reject the same contention made on behalf of appellant Diulus. *See United States* v. *Ceraso, supra; United States* v. *Riehl*, 460 F.2d 454, 459 (3d Cir. 1972).

Appellant Scolieri, against whom the sole evidence is recorded telephone calls, contends these were not sufficiently identified. Circumstantial evidence supports the identification. *See United States* v. *Addonizio*, 451 F.2d 49, 71-72 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972);

United States v. *Alper*, 449 F.2d 1223, 1229 (3d Cir. 1971), *cert. denied*, 405 U.S. 988 (1972).

The judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 72-1696 thru 72-1703

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: June 6, 1973

APPENDIX D

Statutes Involved

18 U.S.C. 2516 provide, in pertinent part:

> (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications * * *.

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) tne identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
>
> • • • • • • • •
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> • • • • • • • •
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> • • • • • • • •
>
> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivi-

sion thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

• • • • • • • •

18 U.S.C. provides, in pertinent part:

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

Supreme Court, U. S.
FILED
MAY 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. IANNELLI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Pursuant to Rule 24(5) of the Rules of this Court the following memorandum is submitted in light of the decisions of this Court in the case of *United States* v. *Giordano*, No. 72-1057, decided May 13, 1974, and *United States* v. *Chavez*, No. 72-1319, decided May 13, 1974.

In our petition in No. 73-64 and again in our reply to the memorandum of the Solicitor General we pointed

out that while the issues of proper authorization and identification raised in *Giordano* and *Chavez* were present in our case, there was additionally present the critical problem of the burden of proof and the quantum of evidence required to show that an alleged authorization by the Attorney General had in fact been given. We ask that the Court grant certiorari on question 1 * in the petition limited to the following issues included thereunder:

(a) Where the Government had erroneously represented to the judge who issued the wiretap warrant that the Assistant Attorney General had authorized an application therefor, does the Government have the burden of proving that authorization was in fact given by the Attorney General? If so, what is the quantum of the Government's burden: by a mere preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt?

(b) Can such burden be satisfied in the absence of any sworn statement by the Attorney General that he personally authorized the wiretap application?

In the majority opinion in *Chavez,* this Court said at p. 16:

> "When it is *clearly established,* therefore, that authorization of submission of a wiretap or electronic surveillance application has been given by the Attorney General himself, but the application, and, as a result the interception order, incorrectly state that approval has instead been given by a specially designated Assistant Attorney General,

* The Solicitor General's Memorandum in response to the petition has agreed that certiorari should in any event be granted on question No. 2, which presents an issue unrelated to electronic surveillance.

> the misidentification, by itself, will not render interceptions conducted under the order 'unlawful' . . ." (Emphasis added.)

This, we submit, at least implies that the applicable burden of proof is by clear and convincing evidence. Since the information that must be proved is solely within the Government's knowledge, no lesser quantum of proof would be appropriate.

In the instant case the authorization by the Attorney General has not only not been "clearly established"; we contend that it has not been established at all. For here, unlike *Chavez, no affidavit was submitted by the Attorney General.* In this case the Executive Assistant to the Attorney General, Mr. Lindenbaum, submitted an affidavit alleging that the Attorney General personally approved the application. When Mr. Lindenbaum was subsequently deposed in this case he testified that he did not discuss this case with Mr. Mitchell and did not see him place his initials on the memorandum of authorization. (407a-412a.)

The need for sworn testimony, by affidavit or otherwise, from the Attorney General himself, is not only an evidentiary one. It also serves the need, stressed by both majority and dissenting opinions in *Chavez,* to "fix responsibility" for the wiretap authorization. The majority and dissent in *Chavez* differed as to whether it was adequate for responsibility to be "established by an *ex post facto* affidavit of the Attorney General, stating that he in fact authorized the Chavez surveillance." (Dissenting opinion at p. 9.) But here there has never been, ex post facto or otherwise, an affidavit of the Attorney General stating that he authorized the surveillance. Rather such responsibility has been attributed to him by the allegations of a subordinate ap-

pointed official, and neither affirmed nor denied by the Attorney General himself.

This Court has within the past few days decided that the matter of proper authorization in wiretap cases is an issue of grave importance. However, this Court's decisions in *Giordano* and *Chavez* leave unanswered the questions of the proper evidentiary method of proving proper authorization and the attendant problem of the burden of proof therein.

It is clear now that the Executive Assistant to the Attorney General may not authorize electronic surveillances. What is not clear now is whether the testimony of the Executive Assistant to the Attorney General may be substituted for the testimony of the Attorney General, when the executive assistant by his own admission has no first hand knowledge of what actually occurred in a particular case such as the instant one.

The issues relating to proof of authorization, raised by this memorandum, have been raised by us in the District Court, in the Circuit Court, and in this Court in our original petition and again more extensively in our Reply to the Memorandum of the Solicitor General. We respectfully submit that these issues warrant a grant of certiorari on question 1, or alternatively an Order remanding the case to the District Court for an adequate evidentiary hearing to determine by competent evidence the actual facts as to the alleged authorization.

Respectfully submitted,

JAMES E. MCLAUGHLIN
Attorney for Petitioners

May, 1974

Supreme Court, U. S.
FILED
JUL 11 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. IANNELLI, ANTHONY CANCILLA, ALBERT CAMMARATA, ALBERT DIULUS, MAURICE ORLANSKY, PHILIP SCOLIERI, WILLIAM C. FUSARO, NICHOLAS GOBOS,
Petitioners,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR CERTIORARI FILED JULY 5, 1973

CERTIORARI GRANTED MAY 28, 1974

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. IANNELLI, ANTHONY CANCILLA, ALBERT CAMMARATA, ALBERT DIULUS, MAURICE ORLANSKY, PHILIP SCOLIERI, WILLIAM C. FUSARO, NICHOLAS GOBOS,
Petitioners,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPENDIX

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 71-62 Criminal

UNITED STATES OF AMERICA

v.

ROBERT ELIA IANNELLI, ET AL

RELEVANT DOCKET ENTRIES

DATE 1971	PROCEEDINGS	DOCUMENT NO.
Mar. 25	A True Bill.	
Mar. 25	Indictment filed.	1
Mar. 25	Motion filed by U.S. Atty. and Order entered directing that indictment be sealed until the defendants are in custody or have given bail. (Weis, J)	2
Mar. 25	Motion filed and Order entered directing bench warrant be issued for deft., Rob. Iannelli, setting bond in the amt. of $5,000.00 Own Recog. (Weis, J)	3
Mar. 25	Motion filed and Order entered directing bench warrant be issued for deft., Lorigo, setting bond in the amt. of $5,000.00 Own Recog. (Weis, J)	4
Mar. 25	Motion filed and Order entered directing bench warrants be issued for remaining defts setting bond in the amt. of $5,000.00 Own Recog. for each deft. (Weis, J)	5
Mar. 25	Bench Warrants issued.	
Apr. 27	Arraignment—all 14 defts plead not guilty before Knox, J. (rep Mimless)	0

Aug. 13	Order ent transf case to Weis, J (Teitelbaum, J)	87
Aug. 17	Order ent extending time for filing pretrial motions by all defts to Sept 16, 1971; unless time for filing pretrial motions is again extended, all pretrial motions shall be filed by 9/16/71 (McCune, J)	89
Sept. 22	Hearing on preliminary conference on discovery held before Weis, J. and concluded. Order to be entered (Memo filed) (rep M Wike)	94
Sept. 24	Order ent directing counsel for Iannelli shall complete review of transcripts & tapes by 10/22/71 and other defts's counsel by 10/29/71. Evidentiary hearing on motions to suppress set for 11/1/71 at 9:30 AM Bill of particulars to be filed by 9/30/71, and if agreement cannot be reached, argument will be heard on 11/1/71. Motions for discovery shall be filed before 10/10/71. Briefs to be filed by 10/20/71 and reply briefs by 10/26/71. No motions shall be filed by any party after 11/12/71 (Weis, J.)	95
Sept. 27	Transcript of pretrial held 9/22/71 before Weis, J (rep M Wike)	96
Nov. 12	Motion to dismiss indictment filed by Albert Cammarata, Frances Cammarata and Albert Diulus.	114
Nov. 16	Evidentiary hearing held before Weis, J. and continues (As to all defts.)	116
Nov. 23	Motion to suppress evidence filed by Albert Diulus	123

Nov. 29—Affidavit of Sol Lindenbaum, Exec. Asst to U.S. Atty Gen. with order thereon directing same be filed (Wis, J) 124

Nov. 29—Affidavit of Henry E. Petersen, Acting Asst Atty Gen, Crim Div with order thereon directing same be filed (Weis, J) 125

Nov. 29—Evidentiary hearing held before Weis, J. and contd to 12/21/71

Nov. 30—Memo filed (rep M Wike) Transcript of proceedings held Nov. 29, 1971 before Weis, J. (ReP; M. Wike) 126

Dec. 6—Supplemental motion to dismiss indictment filed by counsel for counsel for Albert Cammarata, Frances Cammarata and Albert Diulus. 129

Dec. 10—Motion to dismiss filed by Robt. Iannelli and Delores Iannelli 130

Dec. 10—Post-evidentiary hearing motion for supplemental discovery filed by R. Iannelli and D. Iannelli 131

Dec. 10—Motion to dismiss indictment filed by L. Faiella, W. C. Fusaro and P Scolieri 133

Dec. 10—Motion to dismiss ct 1 filed by Thos Ciancutti, and Anthony Cancilla 137

Dec. 10—Notice, motion to suppress physical evidence filed by deft Maurice Orlansky 140

Dec. 10—Notice, motion to dismiss indictment filed by Maurice Orlansky with proposed order 141

Dec. 10—Motion to dismiss ct 1 of the indictment filed by deft Nicholas Gobos with proposed order 142

Dec. 22—Supplemental motion to suppress physical evidence and electronic interceptions filed by deft Nicholas Gobos with proposed order 146

DATE 1972	PROCEEDINGS	DOCUMENT NO.

Jan. 11—Motion for reconsideration of court's decision or in alternative, for an order limiting the scope of deposition to be taken of Sol Lindenbaum with proposed order of court 150

Jan. 27—Transcript filed re evidenciary hearing held 12-21-71 before Weis, J. (Rep. M. Wike) 153

Feb. 9—Deposition of Sol Lindenbaum filed. 154

Mar. 17—Motion to dismiss indictment as to deft Joseph Lorigo (deceased) filed by U.S. Atty with proposed order 164

Mar. 17—Order entered dismiss indictment as to deft Joseph Lorigo (deceased) (Weis, J.)

Mar. 22—Transcript of pretrial conference held on 3/10/72 before Weis, Jr. filed. (Rep: M. Wike) 165

Apr. 3—Jury sworn as to all defts—Weis, J.—(rep M. Wike) (deft Ciancutti requests permission not to be present throughout trial—CAV)

Apr. 4—Jury Trial begun before Weis, J. as to all defts (rep M Wike) (except Lorigo—deceased)

Apr. 4—Affidavit of Anthony Cancilla filed 174

Apr. 4—Affidavit of Anthony Cancilla filed 175

Apr. 4—Oral motion by deft. Cancilla not to be present throughout the entire trial—granted orally by Weis, J.

Apr. 4—Oral motion on 4/3/72 by deft. Ciancutti not to be present throughout the entire trial-granted orally by Weis, J.

Apr. 4—Oral motion by counsel for deft. Cancilla not to be present throughout the entire trial—denied orally by Weis, J.

Apr. 5—Jury trial continues.

Apr. 7—Jury trial continues.

Apr. 10—Jury trial continues.

Apr. 11—Jury trial continues. (Oral motions by defts. Cancilla and Scolieri to withdraw a juror—denied orally)

Apr. 12—Jury trial continues.

Apr. 13—Jury trial continues. (Juror #4 dismissed and Alt. #1 became #4)

Apr. 13—Order entered directing that the seal on the tapes is lifted. (Weis, J.) 176

Apr. 14—Jury trial continues.

Apr. 17—Order ent permitting Atty Livingston to divulge contents of intercepted wire communications of voices for comparison (Weis, J.) 177

Apr. 17—Jury trial continues.

Apr. 18—Jury trial continues.

Apr. 19—Jury trial continues.

Apr. 21—Jury trial continues.

Apr. 24—Jury trial continues.

Apr. 24—Transcript of proceedings of in camera hearing 4/14/72 before Weis, J. (rep M. Wike)

Apr. 25—Jury trial continues.

Apr. 25—Hearing on motions to dismiss held before Weis, J.—Memo filed (rep M Wike) Oral motions by defts Ianelli to dismiss cts 1-6—

Granted orally as to Cts 3 & 5 and denied as to cts 4 & 6) (as to Robert Iannelli) (oral motions for judgment of acquittal by all defts.—Granted orally as to defts Frances Camaratta and Steve Bruno and taken CAV as to all other defts)

Apr. 26—Hearing on motion for judgment of acquittal held before Weis, J. and concluded. Memo filed (rep M. Wike) (orally granted to defts Louise Faiella and Thomas Ciancutti.)

Apr. 26—Jury trial continues before Weis, J.

Apr. 27—Jury trial continues.

Apr. 28—Jury trial continues and concludes before Weis, J.—Memo filed (rep M. Wike) (Questions of jurors attached to trial memo) (mistrial declared as to Dolores Iannelli)

Apr. 28—Order re: jury accommodations filed (Weis, J)

Apr. 28—Jury return verdict before Weis, J.—Verdict sheet filed: Guilty as to Robert Iannelli, Albert Cammarata, Anthony Cancilla, Albert Diulus, William Fusaro, Nicholas Gobos, Maurice Orlanski, Philip Scolieri, (all defts as to cts 1 and 2 and R. Iannelli as to cts 1, 2, 4, 6)

May 1—Points for charge filed by counsel for deft Iannelli (affirmed & included in charge)

May 1—Points for charge filed by counsel for Orlanski

May 1—Gov't requests to charge filed

May 1—Requested point for charge filed by counsel for A. Cammarata and A. Diulus (denied, exception noted)

May 5—Motion for new trial and judgment of acquittal filed by deft Wm. C. Fusaro with proposed order

May 5—Motion for new trial filed by deft Robert E. Iannelli

May 5—Motion for judgment of acquittal after verdict filed by Robert E. Iannelli

May 5—Motion for new trial filed by deft Philip Scolieri 191

May 5—Motion for judgment of acquittal filed by deft Philip Scolieri 192

May 5—Motion in arrest of judgment filed by deft Philip Scolieri 193

May 5—Motion for new trial filed by deft Maurice Orlansky with proposed order 194

May 5—Motion for judgment of acquittal or for new trial filed by deft Nicholas Gobos 195

May 5—Order ent granting extension of time to May 12 for filing post trial motions (Weis, J) 196

May 8—Motion for judgment of acquittal or new trial filed by Albert Cammarata, Albert Diulus and Anthony Cancilla. 197

June 15—Notice of sentencing for all defts. for 6/28/72 at 9:30 a.m. filed. 198

June 19—Notice of rescheduling sentencing for 6/26/72 at 9:30 filed. 199

June 23—Motion for speedy trial filed by Dolores Iannelli 200

June 23—Hearing on motion for speedy trial held before Weis, J.—Memo filed. (rep M. Wike) (motion denied. Case to be tried in Sept. and pretried in August) 201

June 26—Sentence Albert Cammarata: Ct 2, Impr 18 mos. and on condition deft be confined in jail type inst for 3 mos. Exec. remainder of sent of impr susp, placed on prob for 3 yrs. Pay fine $10,000 and stand committed until fine is paid. Pay 1/8 costs of prosecution. Ct 1: placed on prob for 5 yrs. Sentences of prob are to run concurrently and are to commence after impr. Deft to comply with rules of prob as stated in open court (Weis, J.) (rep M. Wike) 202

June 26—Sentence Anthony Cancilla: Ct 2: Impr for 18 mos and on condition deft be confined in jail type inst for 3 mos. Exec of remainder of impr is susp and placed on prob for 3 yrs. Pay fine $10,000 and stand committed until fine is paid. Pay 1/8 costs of prosecution. As to Ct 1: placed on prob for 5 yrs. Sentences of prob to run concurr and are to commence after period of impr. Deft to comply with rules of prob as stated in open court (Weis, J) (rep M Wike) 203

June 26—Sentence of Albert Diulus: Ct 2: Impr for 2 yrs and eligible for parole under 18, 4208(a)(2) at such times as Bd of Parole may determine. Pay fine $15,000.00 and stand committed until fine is paid. As to Ct 2: placed on prob for 3 yrs. Pay 1/8 costs. As to ct 1: placed on prob for 5 yrs. Sentences of prob are to run concurr and are to commence after period of impr. Directed to comply with rules of prob as stated in open court. (Weis, J) (rep M Wike) 204

June 26—Sentence William C. Fusaroy: Ct 2: impr for 18 mos and on condition deft be confined in jail type inst for 6 mos, the Exec of remainder

of sent of impr is susp, and deft placed on prob 3 yrs. Pay fine $10,000 and stand committed until fine is paid. Pay 1/8 costs. As to ct 1: placed on prob for 5 yrs. Sentences of prob are to run concurrently and are to commence after period of impr. Directed to comply with rules of prob as stated in open court (Weis, J) (rep M Wike) 205

June 26—Sentence Nicholas Gobos: Ct 2: impr for 18 mos and on condition deft be confined in a jail type inst for 3 mos. Exec remainder of impr is susp, placed on prob for 3 yrs. Pay fine $10,000 and stand committed until fine is paid. Deft to pay 1/8 costs. As to Ct 1: placed on prob for 5 yrs. Sentences of prob to run concurr and are to commence after period of impr. Deft to comply with rules of prob as stated in open court (Weis, J) (rep M. Wike) 206

June 26—Sentence Maurice Orlanski: Ct 2: impr 2 yrs and eligible for parole under 18, 4208(a)(2) at such times as Bd of Parole may determine. Pay fine $15,000 and stand committed until fine is paid. Ct 2: placed on prob for 3 yrs. Pay 1/8 costs. As to Ct 1, deft placed on prob for 5 yrs. Sentences of prob are to run concurrently and are to commence after period of impr. Directed to comply with rules of prob as stated in open court (Weis, J) (rep M Wike) 207

June 26—Sentence Philip Scolieri: Ct 2: Impr for 2 yrs and eligible for parole under 18, 4208(a)(2) at such times as Bd of Parole may determine. Pay fine $15,000 and is to stand committed until fine is paid. As to ct 2: placed on

prob for 3 yrs. Sent of prob are to run concurr and are to commence after impr. Deft to comply with rules of prob as stated in open court (Weis, J) (rep M Wike) 208

June 26—cc of all sentences this date

June 26—Notices mailed (all defts sentenced this date on contd bond pending appeal)

June 26—Sentence Robert Elia Iannelli: Ct 2: Impr 3 yrs, eligible for parole 18, 4208(a)(2) at such time as Bd of Parole may determine. Pay fine $20,000.00 and stand committed until fine is paid. Ct 1: Placed on prob for 5 yrs. Ct 4: Impr 2 yrs. and pay fine $1000.00 and stand committed until fine is paid. Ct 6: Placed on prob 5 yrs and pay fine $1000 and stand committed until fine is pd. Sentence on ct 4 to run concurr with sent on ct 2. Sentence on ct 6 to run concurr with sentence on ct 1. Total fine $22,000.00 and 1/8 costs of prosecution. Deft to comply with rules of prob as stated in open court. All sentences of prob are to run concurrently and are to commence after period of imprisonment. (Weis, J.) (rep M Wike) (deft's bond contd pending appeal) 209

June 26—cc issued

June 26—Notice mailed

June 26—Hearing on motions for new trials and or judgmt of acquittal held before Weis, J Memo filed (rep M Wike) (denied orally) 210

June 27—Affidavit of Thomas Ciancutti waiving rights to be present at trial filed 211

June 30—Praecipe for appearance filed by Edwin J. Martin, Esq. as counsel for Anthony Cancilla. 212

June 30—Notice of Appeal filed by Anthony Cancilla. 213

June 30—Copy of Notice of Appeal mailed U.S. Court of Appeals together with criminal form to accompany criminal appeals & copy of the docket entries; copy of Notice of Appeal mailed U.S. Atty.; letters to counsel for pltf. & deft. & Judge Weis.

June 30—Petition filed and order entered granting leave to deft Nicholas Gobos to depart jurisdiction between 7/1/72 and 7/8/72 (Miller, J.) 214

July 3—Notice of Appeal filed by Cammarata 215

July 3—Notice of Appeal filed by deft Diulus 216

July 3—Copy of Notices mailed U.S. Ct of Appeals together with criminal forms to accompany criminal appeals & copy of the docket entries; copy of Notice of Appeal mailed U.S. Atty.; letters to counsel for pltf & deft & Judge Weis. 216

July 3—Notice of Appeal filed by deft Orlansky.

July 3—Copy of Notice mailed to U.S. Ct of Appeals together with Criminal form to accompany criminal appeal & copy of the docket entries; copy of Notice of Appeal mailed U.S. Atty.; letters to counsel for pltf & deft & Judge Weis.

July 3—Notice of Appeal filed by Deft Scolieri

July 3—Copy of Notice mailed U.S. Ct of Appeals together with criminal forms to accompany criminal appeal & copy of the docket entries; copy of Notice of Appeal mailed U.S. Atty.; letters to counsel for pltf & deft & Judge Weis

July 3—Notice of Appeal filed by deft. Wm C. Fusaro

July 3—Copy of Notice mailed U.S. Ct of Appeals together with criminal forms to accompany criminal appeal & copy of the docket entries; copy of Notice of Appeal mailed U.S. Atty.; letters to counsel for Gov't & deft & Judge Weis.

July 5—Transcripts of tapes marked 29A thru 46A filed at the direction of Judge Weis. 220

July 5—Notice of Appeal filed by deft Iannelli 221

July 5—Copy of Notice mailed U.S. Ct of Appeals together with criminal forms to accompany criminal appeal & copy of the docket entries; copy of Notice of Appeal mailed U.S. Atty.; letters to counsel for pltf & deft & Judge Weis.

July 5—Notice of Appeal filed by deft Gobos 222

July 5—Copy of Notice mailed U.S. Ct of Appeals together with criminal forms to accompany criminal appeal & copy of the docket entries; copy of Notice of Appeal mailed U.S. Atty.; letters to counsel for pltf & deft & Judge Weis.

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 71-62 Criminal

(18 U.S.C., Sections 2, 371, 1302, 1342, 1952 and 1955)

UNITED STATES OF AMERICA

v.

ROBERT ELIA IANNELLI
a/k/a BOBBY I
DELORES IANNELLI
a/k/a DEE
STEVO BRUNO
ALBERT CAMMARATA
FRANCES CAMMARATA
ANTHONY CANCILLA
THOMAS A. CIANCUTTI
a/k/a SONNY
ALBERT DIULUS
a/k/a SOHO
LOUISE FAIELLA
WILLIAM C. FUSARO
a/k/a FUZZY
NICHOLAS GOBOS
JOSEPH LORIGO
a/k/a Jo Jo
MAURICE ORLANSKI
a/k/o Mo
PHILIP SCOLIERI

No. 71-62 Criminal

(18 U.S.C., Sections 2, 371, 1302, 1342, 1952 and 1955)

INDICTMENT

FIRST COUNT

The grand jury charges:

1. That from on or about the 16th day of October, 1970, and continuing thereafter up to and including the

date of this indictment, in the Western District of Pennsylvania, ROBERT ELIA IANNELLI, a/k/a "BOBBY I", DELORES IANNELLI, a/k/a "DEE", STEVE BRUNO, ALBERT CAMMARATA, FRANCES CAMMARATA, ANTHONY CANCILLA, THOMAS A. CIANCUTTI, a/k/a "SONNY", ALBERT DIULUS, a/k/a "SOHO", LOUISE FAIELLA, WILLIAM C. FUSARO, a/k/a "FUZZY", NICHOLAS GOBOS, JOSEPH LORIGO, a/k/a "Jo Jo", MAURICE ORLANSKI, and PHILIP SCOLIERI, defendants herein, and Joseph Iannelli, Louis Ciancutti, Fortunata Cammarata, a/k/a Ann Harkins, Kenneth Ferris, Thomas D'Amiano, a/k/a "Tom D", Arnold Thomas, Mike Huron, Joseph Skundrich, a/k/a "Tooters", William Tyce McCullough, Joanne Pace Haney and Edith Lisanti, co-conspirators but not defendants herein, wilfully and knowingly did combine, conspire, confederate, and agree together and with each other and with drivers other persons whose names are to the grand jury unknown, to commit certain offenses against the United States; that is to say, they conspired and agreed together to mail paraphernalia to be used, and adapted, devised and designed for use in bookmaking in violation of Section 1302, Title 18, United States Code; to use facilities in interstate commerce with the intent to promote, manage, and carry on and facilitate the promotion, management, and carrying on of an unlawful gambling activity, in violation of the laws of the Commonwealth of Pennsylvania, and thereafter to perform acts to promote, manage, carry on, and facilitate the promotion, management, and carrying on of said unlawful activity, in violation of Section 1952, Title 18, United States Code; and to conduct, finance, manage, supervise, direct, and own an illegal gambling business in violation of Section 1955, Title 18, United States Code.

2. It was part of the conspiracy that the aforesaid ROBERT ELIA IANNELLI, a/k/a "BOBBY I", DELORES IANNELLI, a/k/a "DEE", STEVE BBUNO, ALBERT CAMMARATA, FRANCES CAMMARATA, ANTONY CANCILLA, THOMAS A. CIANCUTTI, a/k/a "SONNY", ALBERT DIULUS, a/k/a "SOHO",

Louise Faiella, William C. Fusaro, a/k/a "Fuzzy", Nicholas Gobos, Joseph Loriga, a/k/a "Jo Jo", Maurice Orlanski, a/k/a "Mo", and Philip Scolieri, defendants herein, and Joseph Iannelli, Louis Ciancutti, Fortunata Cammarata, a/k/a Ann Harkins, Kenneth Ferris, D'Amiano, a/k/a "Tom D", Arnold Thomas, Mike Huron, Joseph Skundrich, a/k/a "Tooters", William Tyce McCullough, Joanne Pace Haney and Edith Lisanti, hereinafter sometimes referred to as "the conspirators" did conduct, finance, manage, supervise, direct, own, and facilitate the conduct, financing, management, supervision, direction, and ownership of an unlawful activity, said unlawful activity being an illegal gambling business in violation of the laws of the Commonwealth of Pennsylvania, to wit, Purdon's Pennsylvania Statutes, Title 18, Sections 4601 and 4607; and thereafter the conspirators did perform, and attempt to perform acts facilitating the conduct, financing, management, supervision, direction and ownership of said illegal gambling business; and said illegal gambling business involved five or more persons in its conduct, financing, management, supervision, direction and ownership, had a gross revenue of $2,000.00 or more on one or more single days, and was in substantially continuous operation for a period in excess of thirty days.

3. It was also part of the conspiracy that the defendant Robert Elia Iannelli, a/k/a "Bobby I", hired and employed co-conspirators William Tyce McCullough and Joanne Pace Haney, among others, to work in the aforementioned illegal gambling business on a salary basis and that others of the conspiraors, among others, worked in the illegal gambling business on a commission basis.

4. It was further part of the conspiracy that the defendant Robert Elia Iannelli, a/k/a "Bobby I", and co-conspirator Joanne Pace Haney would mail and cause to be mailed on a weekly basis during the football season copies of "Weekly Football Schedules and News" to per-

sons involved in the aforementioned illegal gambling business for the purpose of facilitating the dissemination of football "line" and point spread information, necessary to the operation of the aforementioned illegal gambling business.

5. It was further part of the conspiracy that defendant Robert Elia Iannelli, a/k/a "Bobby I", and co-conspirator William Tyce McCullough would and did receive and disseminate "line" and point spread information to the conspirators and other persons and would and did accept bets and wagers on sporting events from said conspirators and other persons.

6. It was further part of the conspiracy that the defendants Robert Elia Iannelli, a/k/a "Bobby I" and Thomas A. Ciancutti, a/k/a "Sonny" and co-conspirator Louis Ciancutti agreed together that defendant Robert Elia Iannelli should accept bets and wagers from certain individuals and that defendants Robert Elia Iannelli and Thomas A. Ciancutti would and did divided and share the proceeds from these individuals.

7. It was further part of the conspiracy that the defendant Robert Elia Iannelli, a/k/a "Bobby I", would obtain information from defendant Joseph Lorigo, a/k/a "Jo Jo", concerning the scores of football games, knowing that defendant Joseph Lorigo, a/k/a "Jo Jo" would and did obtain this information from Western Union Sports Tickers and that this information was transmitted from outside of the Commonwealth of Pennsylvania; and that defendant Robert Elia Iannelli, a/k/a "Bobby I", would then disseminate the information received from defendant Joseph Lorigo to other persons involved in the aforementioned illegal gambling business.

8. It was further part of the conspiracy that co-conspirators Kenneth Ferris and Mike Huron would assist in, arrange for, and facilitate the collection of monies

owed to defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", as a result of the aforementioned illegal gambling business.

9. It was further part of the conspiracy that several of the conspirators would meet periodically among themselves and with other persons for the purpose of exchanging monies due and owing to each other as a result of the aforementioned illegal gambling business.

10. It was further part of the conspiracy that the defendant DELORES IANNELLI, a/k/a "DEE", would supervise, conduct, manage, and direct that part of the aforementioned illegal gambling business dealing with numbers bets.

11. It was further part of the conspiracy that the defendant DELORES IANNELLI, a/k/a "DEE", would and did receive telephonically from certain of the conspirators the "gross, net and balance" figures of other conspirators, which figures were derived by tabulating the total of numbers bets accepted by said conspirators in a given week; and also that defendant DELORES IANNELLI, a/k/a "DEE", would and did accept numbers bets telephonically.

OVERT ACTS

In pursuance of and in order to further the objects, designs, and purposes of the conspiracy, the conspirators and defendants did do and perform, among others, the following overt acts in the Western District of Pennsylvania:

1. On October 21, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", spoke telephonically with co-conspirator Edith Lisanti.

2. On October 22, 1970, defendant FRANCES CAMMARATA spoke telephonically with defendant ROBERT ELIA IANNELLI, "BOBBY I".

3. On October 22, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with co-conspirator Arnold Thomas.

4. On October 23, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with co-conspirator William Tyce McCullough.

5. On October 23, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with co-conspirator Kenneth Ferris.

6. On October 24, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with defendant THOMAS A. CIANCUTTI, a/k/a "SONNY".

7. On October 24, 1970, defendant DELORES IANNELLI, a/k/a "DEE", placed a telephone call to and spoke with defendant ALBERT CAMMARATA.

8. On October 24, 1970, defendant DELORES IANNELLI, a/k/a "DEE", placed a telephone call to and spoke with co-conspirator Fortunata Cammarata, a/k/a Ann Harkins.

9. On October 24, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", spoke telephonically with co-conspirator Thomas D'Amiano, a/k/a "Tom D".

10. On October 24, 1970, defendant ROBERT ELIA IANNELLI a/k/a "BOBBY I", spoke telephonically with defendant JOSEPH LORIGO, a/k/a "Jo Jo".

11. On October 24, 1970, defendant ANTHONY CANCILLA placed a telephone call to and spoke with defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I".

12. On October 24, 1970, co-conspirator William Tyce McCullough placed a telephone call to and spoke with defendant STEVE BRUNO.

13. On October 25, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", spoke telephonically with defendant NICHOLAS GOBOS.

14. On October 25, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with co-conspirator Joseph Skundrich, a/k/a "Tooters".

15. On October 26, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with defendant MAURICE ORLANSKI, a/k/a "Mo".

16. On October 26, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with defendant ALBERT DIULUS, a/k/a "SOHO".

17. On October 27, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with defendant WILLIAM C. FUSARO, a/k/a "FUZZY".

18. On October 27, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with co-cospirator Mike Huron.

19. On October 29, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", spoke telephonically with co-conspirator Louis Ciancutti.

20. On October 29, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", spoke telephonically with defendant LOUISE FAIELLA.

21. On October 29, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", spoke telephonically with co-conspirator Joanne Pace Haney.

22. On October 29, 1970, co-conspirator William Tyce McCullough placed a telephone call to and spoke with co-conspirator Joseph Iannelli.

23. On October 30, 1970, defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", placed a telephone call to and spoke with defendant PHILIP SCOLIERI.

In violation of Title 18, United States Code, Section 371.

SECOND COUNT

The grand jury further charges:

That from on or about the 16th day of October, 1970, and continuing thereafter up to and including the date of this indictment, in the Western District of Pennsylvania, ROBERT ELIA IANNELLI, a/k/a "BOBBY I", DELORES IANNELLI, a/k/a "DEE", STEVE BRUNO, AIBERT CAMMARATA, FRANCES CAMMARATA, ANTHONY CANCILLA, THOMAS A. CIANCUTTI, a/k/a "SONNY", ALBERT DIULUS, a/k/a "SOHO", LOUISE FAIELLA, WILLIAM C. FUSARO, a/k/a "FUZZY" NICHOLAS GOBOS, JOSEPH LORIGO, a/k/a "Jo Jo", MAURICE ORLANSKI, and PHILIP SCOLIERI, the defendants herein, did knowingly and wilfully conduct, finance, manage, supervise, direct, and own an illegal gambling business, such business, such business having a gross revenue of $2,000.00 or more on one or more single days, involving five or more persons in its conduct, financing, management, supervision, direction, and ownership, being in substantially continuous operation for a period in excess of thirty days, and being in violation of the laws of the Commonwealth of Pennsylvania, Purdon's Pennsylvania Statutes, Title 18, Sections 4601 and 4607; in violation of Section 1955, Title 18, United States Code.

THIRD COUNT

The grand jury further charges:

That on or about the 24th day of October, 1970, in the Western District of Pennsylvania, the defendants ROBERT ELIA IANNELLI, a/k/a "BOBBY I" and JOSEPH LORIGO, a/k/a "Jo Jo", did use and cause to be used in interstate commerce between the city of Chicago in the state of Illinois and the city of Erie in the Commonwealth of Pennsylvania, the ticker tape facilities of the Western Union Telegraph Company, with intent to promote, manage, and carry on and facilitate the promotion, management, and carrying

on of an unlawful activity, said unlawful activity being a business enterprise involving gambling in violation of the laws of the Commonwealth of Pennsylvania, Purdon's Pennsylvania Statutes, Title 18, Section 4607; and, thereafter, ROBERT ELIA IANNELLI, a/k/a "BOBBY I" and JOSEPH LORIGO, a/k/a "Jo Jo", did perform and cause to be performed acts to promote, manage, carry on, and facilitate the promotion, management, and carrying on of said unlawful activity; in violation of Section 1952, Title 18, United States Code.

FOURTH COUNT

The grand jury further charges:

That on or about the 11th day of March, 1970, in the Western District of Pennsylvania, the defendant ROBERT ELIA IANNELLI, a/k/a "BOBBY I", did knowingly cause to be deposited in the mail paper and writing to be used, and adapted, devised, and designed for use in bookmaking, in that on the above date he did cause to be deposited in the mail an envelope addressed to "Al Diulus, 5472 Pocusset St., Pgh., Pa. 15217," said envelope containing cards entitled "Rules Applicable to Incomplete Games"; in violation of Sections 1302 and 2, Title 18, United States Code.

FIFTH COUNT

The grand jury further charges:

That on or about the 17th day of November, 1970, in the Western District of Pennsylvania, the defendant, ROBERT ELIA IANNELLI, a/k/a "BOBBY I", did knowingly cause to be deposited in the mail paraphernalia to be used, and adapted, devised and designed for use in bookmaking, in that on the above date he did cause to be deposited in the mail an envelope addressed to "Al Diulus, 5472 Pocusset St., Pgh., Pa. 15217", said envelope containing a copy of "Weekly Football Schedules and News"; in violation of Sections 1302 and 2, Title 18, United States Code.

SIXTH COUNT

The grand jury further charges:

That from on or about the 1st day of September, 1967, and continuing thereafter until the 20th day of September, 1969, in the Western District of Pennsylvania, the defendant ROBERT ELIA IANNELLI a/k/a "BOBBY I", and William Tyce McCullough, who is not named as a defendant herein, for the purpose of conducting and carrying on by means of the Post Office Department of the United States an unlawful business, did use and assume false and ficitious names, and names other than their own proper names, in that during the above period they did use and assume the names William Culp and Robert Jarvis, respectively, which names were false and fictitious and which were other than their own proper names, for the purpose of conducting and carrying on unlawful bookmaking activity in violation of the laws of the Commonwealth of Pennsylvania, Purdon's Pennsylvania Statutes, Title 18, Section 4607, by means of the Post Office Department of the United States; in violation of Section 1342, Title 18, United States Code.

A True Bill,
Foreman

RICHARD L. THORNBURGH
United States Attorney

JULES T. BRUNNER
Special Attorney
United States Department of Justice

U.S. DISTRICT COURT, W.D. PA.

PRELIMINARY CHARGE OF THE DISTRICT COURT

19 After making your own judgment, you will give the testimony of each witness such creditibility as you think it deserves.

As you will note from the little schedule which we have given you, all of the defendants are not charge with all of

the counts. I had this schedule prepared for you so that you might have that made a little clearer as the case begins. Obviously it is going to require your close attention when the evidence comes in as to any one of the defendants, to find out which count it may apply to and what that count involves. Now at the bottom of that sheet of paper I have listed the general subject matter of each count. Now I don't want you to think that the caption we have given this really tells you a whole lot about each count. It is simply a shorthand way of calling your attention to some of the different phases that will be involved as we go along.

Now in the first count of the indictment all of the defendants are charged with conspiring to commit an offense or offenses against the United States. I will read to you what the general law pertaining to conspiracy is as contained in the United States Code. It reads as follows:

"If two or more persons conspire to commit any
20 offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the United States."

Let me run over it again.

"If two or more persons conspire to commit an offense against the United States and one or more of those persons do an act to effect the object of the conspiracy, then all of those are guilty of conspiracy."

There are four essential elements that must be proved in order to establish the offense of conspiracy. First, the conspiracy described in the indictment must be willfully formed and was existing at or about the time alleged in the indictment. Second, that the accused or accused willfully became a member or members of the conspiracy. Third, that one of the conpirators thereafter knowingly committed at least one of the overt acts charged in the

indictment. Four, that this overt act was knowingly done in furtherance of some object or purpose of the conspiracy.

I know this is a difficult legal concept to charge on. I will repeat it for you at the end of the case. I'm
21 giving it to you now so you might have some idea of what the charges are that are contained in the indictment so listen carefully to them, but don't give up the ship, if you don't understand it all at this point. Do the best you can.

Now one may become a member of a conspiracy without full knowledge of all the details of the conspiracpy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Before you may find that a defendant or any person has become a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or some other person who is claimed to have been a member willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something which the law forbids. One who willfully joins in an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

22 In determining whether a conspiracy existed, you should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, you should consider only his actions and statements. He cannot be bound by the actions or declarations of other participants until it is established a con-

spiracy existed and he was one of its members. This, I think, will become clear, too, as we go along.

Any statements, therefore, of a conspirator which are not furtherance of a conspiracy, or may be before its existence, or after it was over may be considered as evidence only against the person making them. A person cannot conspire with himself and therefore you must find at least two people involved in the conspiracy before there can be proof of this crime.

Again, you have to listen carefully to the evidence, since there are numerous defendants, and if there is a conspiracy proved, you must be satisfied beyond a reasonable doubt that the evidence establishes the conspiracy as to each defendant that you find guilty or each one participated, if you so find.

23 On the first count of the indictment all the defendants are charged with conspiring to commit offenses against the United States. One of these offenses is alleging together that the defendants conspired to mail paraphernalia to be used and adapted and devised and designed for use in bookmaking, in violation of the United States Code. I will read you just briefly and in part from that part of the United States Code.

"Whoever knowlingly deposits in the mail or sends or delivers by mail any letter, package, postal card or circular containing any lottery, gift enterprise or similar scheme offers prizes dependent in whole or in part on lot or chance or any record, paraphernalia, paper, writing or any other device used or to be used or adapted, or devised for use in bookmaking or wagering pools with respect to a sporting event is guilty of an offense."

Now the first count also charges as part of the conspiracy that the defendants conspired to use facilities and interstate commerce with the intent to promote, manage, carry on and facilitate the promotion, management and

carrying on of an illegal gambling activity in violation of the laws of the Commonwealth of Pennsylvania,
24 and thereafter to perform acts to promote, manage and carry on, et cetera, the carrying on of this unlawful activity.

As used in this particular section of the law, unlawful activity means a business enterprise involving gambling and/or offenses in violation of the laws of the state in which they are committed or the United States.

So these are two statutes.

The first count also charges that the defendants also conspired to violate another law which is designated as Section 1955 of the United States Code. Now this statute provides in part that whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business is guilty of an offense against the United States. Now, in this connection, in this particular statute illegal gambling business means one which is in violation of the law of the state in which itis conducted, that it involves five or more persons who conduct, finance, manage, supervise, direct or own the business; third, and has been or remains in substantially continuous operation for a period in excess of 30 days, or if it has not been in existence that long, has a gross revenue of $2,000 in any one one single day.

25 The meaning of gambling includes, but is not limited to, pool selling, bookmaking or numbers.

We still have a little further to go. I told you before that one of the conditions of one of these statutes was that the gambling had to be in violation of the laws of Pennsylvania, since it is alleged that it occurred here.

Now the appropriate section of the Pennsylvania Law provides in part that whoever either publicly or privately erects, sets up, opens, makes or draws any lottery, or is in any way concerned with the managing, conducting or

carrying on the same is guilty of an offense against the Commonwealth of Pennsylvania.

Of course, you know there is an exception that the State is authorized to carry on one lottery authorized by the State Legislature, but only the State is so authorized.

Now in another section the Pennsylvania Law reads that whoever engages in pool selling or bookmaking or occupies any place with books, apparatus or paraphernalia for the purpose of recording or registering bets or wagers or of selling pools, or records or registers bets or wagers, or being the owner or lessee or occupant of any premises, knowingly permits the same to be used or occupied
26 for any of such purposes, or keeps, exhibits or employs therein any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodians or depository for gain, hire or reward of any money, property or thing of value staked, wagered or pledged, or to be wagered or pledged upon any such result, or receives, registers, records, forwards, or purports or pretends to forward, to or for any recourse, any money, thing or consideration of value, bet or wager or money, thing or consideration, offered for the purpose of being bet or wagered upon the speed or endurance of any man or beast, or occupies any place with books, papers, apparatus or paraphernalia, for the purpose of receiving or pretending to receive, or attempting to forward in any manner any money, thing or consideration of value, bet or wagered, or to be bet or wagered, for any other person, or receives or offers to receive any money, thing or consideration of value, bet or to be bet at any race track, or assists or abets in any manner in any of the acts forbidden in this section is guilty of an offense against the Commonwealth of Pennsylvania.

Let's review for a second and see if I can simplify it a little bit.

27 The first count alleges a conspiracy, and as I told you, the conspiracy is a plan to violate certain laws and the laws which are alleged in the complaint to have been violated here involve the first one of mailing in the post office material pertaining to gambling, using interstate facilities for gambling paraphernalia and, third, the operation of a gambling business which I described to you as involving five or more people.

In all the statutes I quoted from, and particularly Pennsylvania, I want to give you some idea of what the law of Pennsylvania considers illegal when it comes to gambling. Now you should be advised at this point, too, that the mere placing of a bet by an individual is not a crime under Pennsylvania Law. Receiving the bet is considered to be a crime under the law, but placing it is not as an individual better.

Now in the second count all the defendants are charged that they did knowingly and willfully conduct a gambling business and in this count, the second count, we are talking about that same statute I reviewed with you a few seconds ago. That is the one which requires five or more people be involved and the way I described to you that it be
28 in business for 30 days or more or have a gross of $2,000 in any one day, and the other factor that it be in violation of the law of the state in which it occurs.

So the first count is a conspiracy to violate this particular law, among others, and the second count is to violate this particular directly.

That is referred to, as you will see down below, conduct, financing, managing, supervising, et cetera.

Now this third count charges that the defendant Robert Iannelli used and caused to be used in interstate commerce between the City of Chicago in the State of Illinois and the city of Erie in Pennsylvania the ticker tape facilities of the Western Union Telegraph Company with intent to pro-

mote, manage and carry on an illegal activtiy, that being a gambling business alleged to be in violation of the law of Pennsylvania. And it sets out thereafter, Mr. Iannelli performed acts designed to promote, manage and carry on and facilitate this unlawful activity.

So count three, you will note, does not apply to all the defendants, but only to Robert Iannelli, and that is the one we have designated in shorthand, using interstate commerce facilities.

29 Now the fourth and fifth counts involve the same statutes, although they charge two separate acts. The fourth count charges Robert Iannelli on March 11, 1970, deposited in the mail paper and writing to be used, adapted, devised and designed for use in bookmaking. That is, on that date he put in an envelope and addressed to Al Diulus, 5472 Pocusset Street, Pittsburgh, Pennsylvania, in which envelope was a card entitled Rules Applicable to Incomplete Games.

In the fifth count it is alleged that Mr. Iannelli put an envelope in the mail on November 17, 1970, addressed to Al Diulus, 5472 Pocusset Street, which contained a copy of the weekly football schedule and news. Now here we are involved in another part of the United States Code. I will refer to that in a bit, too.

It reads, "Whoever—excuse me. I have to find the right one. It reads:—Well, I am not surprised, I can't find that particular section here. I will have to read that to you, perhaps tomorrow. It involves, generally, that placing certain information in the mail which pertains to gambling is aganst the law. I will read that to you tomorrow.

I can't very well be unhappy if you can't remember
30 all I read to you, if I cannot get it all collected here, can I.

As part of the fourth count the Government charges also that the defendants aided and abetted, as well as were principals of the criminal conduct of which complaint is made. Now the section of the code that pertains to aiding and abetting reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as principal.

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

It is not essential to the conviction of a person alleged to be an aider and abetter that the principal be tried or, in fact, even be identified.

This section of the United States Code is applicable to all of the counts other than the first one. It is the law that an individual may be indicted for commission of a substantive crime, that is, for example, the one in count two, and nevertheless be convicted by proof showing him to be and aider and abetter.

31 Now the sixth and last count charges that on or about the first day of September, 1967, and continuing until about the 20th day of September, 1969, in the Western District of Pennsylvania, the defendants Robert Iannelli and William Tyce McCullough, who is not named as a defendant in this case, for the purpose of carrying on by means of the post office department an unlawful business, did use and assume false and fictitious names; that is the names William Culp and Robert Jarvis respectfully, for the purpose of carrying on the unlawful bookmaking activity alleged to be in violation of the laws of Pennsylvania.

This brings out one more statute and it is the last one we will talk about today. This statute is known as Section

1342 and it says in part anybody who for the purpose of conducting, promoting or carrying on by means of the Post Office Department of the United States, any unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false or assumed title, name or address or name other than his own proper name, or takes or receives from any post office or authorized depository any mail matter, letter, postal card, package or other mail matter addressed to any such fictitious, false or assumed title, name or address, or name other than his own proper name
32 is guilty of an offense against the United States.

Now notice the beginning of that, "Whoever for the purpose of carrying on or conducting an unlawful business uses or assumes a fictitious name." You have to have that essential element. Someone could mail you a post card with a different name or a nickname or a joking name you have among yourselves, and you accept that card and it would not be a violation of the law, because it is not intended as part of an illegal business. The first part must be there to make the use of a fictitious name a crime.

We have read over a lot of statutes and I am sure you don't remember all of the details of each one of them, but I hope that by starting out this way you would have some idea of what direction we are heading in and what you should be listening to, and particularly be sensitive to as the trial proceeds.

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2467 U.S. DISTRICT COURT, W.D. PA.

FINAL CHARGE OF THE DISTRICT COURT

THE COURT: Good morning, ladies and gentlemen. It is nice to see you all made it. I thought maybe somebody would stay away.

We have now come to that part of the case, ladies and gentlemen, where it is my duty to charge you on the law

which you should apply to this case. I have charged you at the beginning of the case and at various times during the trial itself.

You should take the instructions as I am giving them to you now in connection with and in addition to the previous instructions on the law as I gave them to you, insofar as they are applicable at this time. There are some instructions which I gave you at the beginning of the case with regard to certain matters which are no longer before you, which, of course, you no longer need be concerned with.

As I mentioned to you at the very beginning of this case, you are the modern representatives of an ancient and honorable institution of the law, known as a "Jury of Twelve." The jury system has existed among the English-speaking people for centuries, and the fact that it has survived for so long a time in substantially its original form, is a tribute to the conscientiousness and fidelity of
2468 the jurors who have sat in your places in thousands of courtrooms across this country. I am sure you realize the seriousness of your duty and you will carry out your obligations as well in deliberating, as you have up to this point in your outstanding attentiveness to this evidence.

You must place yourselves in this court of justice as officers of the court, representatives of the people charged with the duty of participating in the administration of justice, dispelling from your minds any passion, any fear, any thought of favor or any other unworthy emotion which might creep into your deliberations, or which might interfere with your calm reflection and prevent the proper exercise of your function as jurors.

We are all here for one purpose and that is to discover the truth, and having discovered it, to apply the law of the land as it has been established, and to administer justice accordingly.

It is your sworn and solemn duty to judge this case fairly and squarely upon the evidence and upon the evidence alone, making the necessary application of the law as the Court gives it to you. It is not your idea of what the law is or should be, but as I give it to you. And in similar fashion, it is not my idea of what I think the law should be, but must govern my instructions to you. I am bound by the law, too. Of course, if I make a mistake in the law, it is on the record and that mistake may be corrected, but if you don't apply the law as I give it to you, you will have done an injustice, and I am sure you don't wish to do that. The law requires that those who are proved guilty according to set standards, should be speedily punished and those who are innocent should just as speedily be set free.

No matter what your verdict is, it must be unanimous to reflect the vote of everyone of you. Each and every juror must agree to the final conclusion which you will return to us here in open Court. Any verdict which does not reflect the view of each and every juror in its entirety would be improper and would not be acceptable. We have a jury slip prepared and each of you will be required to sign it. This slip, which we will send out, lists the names of every party and is broken down to every count. You will be required to make a finding as to the guilt or innocence as to each party and as to each count.

One of your first duties as jurors will be to select a foreman who will lead your discussions and will announce your verdict when you have reached it. He will conduct your meetings and generally organize your deliberations.

I want you to understand at the beginning of the case that I am absolutely neutral in presenting these instructions to you. While I have the privilege under the law of expressing my own opinions to you, I told you that I would not and at this time, I will say again, I will not express my opinion to you as to the guilt

or innocence of the parties. I am leaving that decision to you. It is within your province. It is your job. Therefore, I don't want you to take the fact that I talk about any one phase of the case more than another as indicating that I favor one side or the other.

The fact is, as you know, that some ideas take more words than others. If I talk about some evidence and don't talk about others, again, I am not trying to indicate in any fashion whatsoever what you should do or how you should decide the case. I am only going to take a certain amount of time to discuss the law, and while it may be longer than I would like it to be, obviously, I cannot review everything that has happened in the last four weeks.

There are certain fundamental principles which you must apply in arriving at your conclusions based upon the facts in the case. While I am delivering these instructions I may, of necessity, refer to the facts, I wish to caution you that you are the sole judges of the facts in the case. Therefore, if any statement, remark or argument of any lawyer during the case was not supported by evidence, you should disregard that statement, argument or remark. Similarly, if I made any statement about the facts during the case or if I should make some remark about the facts in my charge to you which does not agree with your recollection, you take your recollection. You are the sole judges of the facts.

Under our system of justice, every person is presumed to be innocent of a crime until proven guilty, even though he may have been arrested and indicted. It is, therefore, your duty to decide this case and the guilt or innocence of the defendant solely upon the evidence which has been brought before you.

You are not to be influenced in any way by the fact that the defendants have been arrested or indicted. An indictment is only the formal method by which the Government

accuses a defendant and charges him with a crime. It is just a piece of paper setting out what contention the Government has. It is not evidence of any kind against a defendant and does not create any presumption or permit any inference of guilt. The defendants are presumed to be innocent until proven by the evidence in the case to be guilty beyond a reasonable doubt.

It is your responsibility to determine from the evidence the guilt or innocence of the defendants of the offenses charged. It is not your responsibility to determine the penalty involved, if any. That is the Court's problem.

I have said also that it is your responsibility to determine whether or not the credible or believable evidence is sufficient beyond a reasonable doubt to convict.

2472 A reasonable doubt does not mean all possible doubt. It does not mean a fanciful doubt, such as, for instance, a juror might use simply to avoid an unpleasant duty. It means the lack of moral certainty. A reasonable doubt means that the mind of the juror is left in doubt after an honest consideration of all the evidence in the case and does not rest easily upon the certainty of the guilt of the accused. There need not be absolute certainty, but there must be a moral certainty. There must be the absence of such a doubt as would cause a reasonable man to hesitate to act in matters of importance to himself. The test for the conviction of an accused is whether or not the collective minds of twelve jurors rest easily upon the certainty of the guilt of the accused of the offense charged after you have given the entire evidence careful, fair and just consideration.

In order to convict, you must find beyond a reasonable doubt that each and every element of the offense charge has been established. If you do not so find, it is your duty to acquit.

You should analyze all of the evidence and harmonize as much of it as you can. If there are conflicts in the testi-

mony that cannot be resolved by harmonizing them, then you must determine which evidence is factual and that which is not. You will recall the evidence. I have indicated to you that I will not review it in any great

2473 detail, other than to point out a few points where I think you should review the evidence, and I am doing this even in some trepidation, because if I mention one fact, perhaps it will result in overemphasizing that to the detriment to other facts which you might consider just as or more important and I don't want to do that.

Obviously, in a case which has taken several weeks to try, I could not cover in detail the testimony of the various witnesses. So, again, if I attempt to jog your memory with regard to certain phases of the case, don't take this as any indication that I say this evidence is more important than the other, or you should not consider all the evidence you have heard over this period of time.

Generally, I will leave the recollection of the testimony to you. The attorneys for the various parties have summed it up to you very ably with the last day's summation, and most of it, I am sure will have been refreshed by their closing addresses.

Now, you weigh the evidence in quality rather than quantity, although quantitative evidence should not be disregarded, if it comes from the lips of disinterested parties to the outcome of the case. In the final analysis, however, it is the quality that counts, rather than accumulation. This means that the evidence of one witness on a certain point could be so persuasive to you as to its quality, and therefore, its credibility, that it could outweigh the

2474 evidence given by two or more witnesses on the same point that may have told you a slightly contradictory story. Keep in mind that it is credible evidence which should guide you. There is no rule of law which has been devised with which I can tell you how to judge the credibility of witnesses and how not to make a mistake on it.

All I can say to you is that you will exercise your good common sense and your experience in life when you come to judge where credibility lies. It is for you and you only to decide who is and who is not to be believed in a case like this.

You may judge the credibility of a witness by the manner in which he gives his testimony, his demeanor on the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about which he has testified, his interest in the case, his motive or reason for testifying, or any circumstances that might tend to shed light on the truth or falsity of his testimony.

You are at liberty in the exercise of honest judgment to believe or disbelieve the testimony of any witness in whole or in part, taking into consideration, of course, all the facts and circumstances of the case.

Any evidence which I have ordered to be stricken and/or exhibits that I have refused to admit into evidence cannot be the basis for any decision by you. You must exclude that from your minds.

2475 Your verdict must be based on the evidence that has been brought before you and the testimony before you in the courtroom.

The law does not compel a defendant in a criminal case to take the witness stand and testify and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. As stated before, the law never imposes upon the defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The burden is upon the Government.

You have heard testimony by two witnesses who were granted immunity from prosecution by the Government. This means that these two witnesses cannot be prosecuted about the matters they testified to. You must keep in mind

when considering the credibility of these witnesses that there has been a lasting relationship with some of the defendants and the fact that they have been granted immunity by the Government. Weigh all these factors when you come to consider the credibility of these witnesses. In this case, also, certain evidence has been presented to you by an expert witness.

Ordinarily, it is for you to determine the facts and form your own opinions and conclusions from them without being influenced by the opinions and conclusions of others. Where a question is one which requires some specialized knowledge not ordinarily possessed by jurors or
2476 judges, we are permitted to consider the opinion of persons who are experts in their fields. You may consider and weigh the opinions of the experts which are expressed to you in connection with the gambling activities in this case, or with the technical devices used in the case.

You should understand that an opinion creates no fact. It is what someone thinks about something and the thought may be precisely accurate or totally inaccurate, and yet represents the honest conviction of the person who expresses it.

Because of this, generally, opinion evidence is considered of a lesser grade than factual testimony and is generally not entitled to as much weight as against positive testimony of actual facts. There is a great difference between factual and opinion testimony. In the one, the witness testifies to the facts and certifies that what he says is true. In the other, he only testifies as to his integrity of belief. He says he believes his opinion to be correct, and he does not pretend that he cannot be mistaken.

Again, the credibility of an expert witness is for you, as with all other witnesses.

You may reject in whole the opinion of any witness you disbelieve and that is whether his opinion is contradicted

or not; to the contrary, you may accept all his opinion, if you so choose.

2477 As I mentioned to you at the beginning of the case, separate crimes are charged in various counts of the indictment and all the defendants are not charged with all of the counts. May I emphasize, again, that each defendant is entitled to have his guilt or innocence determined as to each of the crimes charged against him from the evidence which applies to him, as if he were being tried alone. These cases are being tried together mainly because of convenience to the Government and in the interests of the economy of the time spent in court.

Obviously. it would take longer to try each separate defendant than it would to try them as a group. However, convenience to the Government and the Court does not mean that any of the defendants is to be denied his right of being required to defend only against the evidence which is applicable to him and not that which is only applicable to someone else.

If you find, therefore, that a defendant is guilty beyond a reasonable doubt of any of the crimes charged against him in the indictment, a verdict of guilty should be returned as to him only as to those counts in the indictment which have been proved against him. The guilty or innocence of any other defendant of any of the other crimes charged should not influence your verdict with respect to a particular defendant. You may find any one or more of the defendants guilty or not guilty of the counts with which he is charged.

2478 In reviewing the various counts of the indictment, I have decided to review them in reverse order, starting with the last one and working up to the first. I hope in this fashion that the distinction between the various counts will be more easily understood and in doing it in that fashion, too, I think it puts the focus on what evidence

is admissible as to the various counts in a clearer light, so that you can understand the problems that we have with the different kinds of evidence about which we have talked a number of times during the trial.

I am not suggesting that you have to, but you might find it more logical and convenient for you, also, in your deliberations on the various counts, to start with the last one and work forward. That is, to do No. 6, first, and gradually come back nutil you get to No. 1. Again, I will leave that matter to you and to your foreman, but as I review the counts, perhaps you can see the reason why I am doing it in that fashion.

The fourth and sixth counts involve only the defendant, Robert Ianelli. Therefore, on any of these particular counts, only Mr. Ianelli is being charged with having committed the specific crimes set out. I do want to caution you, however, that some of the statutes that I refer to in discussing these counts will be called to your attention later in connection with the other counts.

2479 Now, the sixth count charges Mr. Ianelli and William Tice McCullough with having assumed the fictitious names of William Culp and Robert Jarvis in the period from September 1, 1967, and continuing through September 20, 1969, for the purpose of conducting and carrying on an unlawful bookmaking activity, in violation of the laws of Pennsylvania, by using facilities of the Post Office Department and in the violation of the laws of the United States, particularly Sections 1342 of Title 18, United States Code.

Now, with respect to this particular count, I call your attention to the testimony of Mr. McCullough with respect to the rental of an apartment off McKnight Road, by himself and Mr. Ianelli in the names of William Culp and Robert Jarvis. You will recall his testimony about the purpose of renting the apartment, how the phones were

billed, and the testimony of the credit manager from the Bell Telephone Company, Mr. Robert Ellis, who described the methods of billing and introduced copies of the bills mailed during the April to July period of 1969.

Mr. Ellis' testimony also was to the effect that records show the installation date of the phones at that apartment was in July, 1967.

You will recall that I told you this conduct is claimed by the Government to be in violation of the laws of Pennsylvania and certain statutes pertaining to the Post
2480 Office Department. I will read them to you at this time.

The first one is the Pennsylvania Statute, Section 4607, of the appropriate title, in essence, as it applies to this case—and I have deleted some of the wording of the statute that won't apply to this particular case—

"Whoever engages in bookmaking or occupies any place with books, apparatus, or paraphernalia for the purpose of recording or registering bets or records or registers bets or wagers, or being the lessee or occupant of any premises, knowingly permits the same to be used or occupied for any of such purposes or keeps or employs therein any device or apparatus for the purpose of recording such bets or wagers, or becomes a custodian or depository for gain, hire or reward of any money, property or thing of value wagered or to be wagered, or occupies any place with books, papers, apparatus or paraphernalia for the purpose of receiving or for recording or for forwarding or attempting to forward in any manner, any money, thing of value, bet or to be bet or wagered for any person, or assists or abets in any manner in any of the acts forbidden by this statute, is guilty of an offense against the Commonwealth of Pennsylvania."

Now, the Federal Statute which I referred to, Section 1342, of Title 18, provides, in part, that:

"Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Depart-
2481 ment of the United States, any unlawful business, uses or assumes, or requests to be addressed by any fictitious, false or assumed name or address or name other than his own proper name, or takes or receives from any Post Office any letter or other mail matter addressed to such fictitious, false or assumed name, or name other than his own proper name, is guilty of an offense."

Now, for purpose of this statute, the use of the mails for the promotion of a bookmaking scheme by the use of an assumed name, is within the meaning of the words, "or any unlawful business."

However, the mere use of a fictitious name or receipt of mail in that name would not be a violation of the law unless it is accompanied by a specific intent on the part of the accused to conduct, promote or carry on any unlawful business. Without that intent, no crime is committed.

In other words, if you told a friend of yours to send you a post card addressed to Joe Blow, or some nickname you had at your home, there would be nothing illegal about him sending it to a fictitious name or you receiving it under a fictitious name. The intent to carry on the unlawful business by this mailing is what is required to make it a crime.

In considering the sixth count, the question is: Does the evidence establish beyond a reasonable doubt that Mr. Ianelli violated this section of the Federal law per-
2482 taining to the use of the mails by the utilization of an assumed or fictitious name to carry out an unlawful business with the unlawful intent. Remember, you are dealing only in this case with the violation of the Federal law. If you find that all that Mr. Ianelli did was to violate State law, and that he did not in fact utilize the Post Office Department to get billings from the phone com-

pany, or that he did not use a fictitious name or did not intend to conduct, promote or carry on an unlawful business, then he would not be guilty of that particular charge, the sixth count.

In this count, it is not the violation of the gambling law of Pennsylvania which is charged to be the offense. It is only the violation of the gambling law of Pennsylvania which is claimed that makes the use of the mails unlawful.

Now, the fourth count, again, applies only to Mr. Ianelli. It charges that on March 11, 1970, Mr. Ianelli did knowingly cause to be deposited in the mail, paper and writing to be used and adapted, devised and designed for use in bookmaking, in that he did cause to be deposited in the mail on that date an envelope addressed to Al Diulus at 5472 Pocusset Street, Pittsburgh, Pennsylvania.

This envelope contained cards entitled, "Rules Applicable to Incomplete Games."

It is claimed that this activity of Mr. Ianelli violated Section 1302 and Section 2 of the United States Code.

2483 Section 1302 is rather lengthy and has a great deal of repetition in it. I will read to you only such excerpts that I think will be of assistance to you.

The Statute says that:

"Whoever knowingly deposits in the mail, or sends or delivers by mail, any letter or circular containing any lottery or similar scheme offering prizes dependent in whole or in part upon lot or chance, is guilty of an offense against the United States."

The statute goes on to include by reference to another law the items which are not to be deposited in the mail at any record or paraphernalia, slip, paper, writing or other device used or to be used, or adapted, devised or designed for use in bookmaking, and that any such person who knowingly deposits in the mail or sends or delivers by mail

such material is guilty of violating the laws of the United States.

So, summing up, knowingly depositing in the mail or sending or delivering by mail a paper, writing, or other devices used or to be used or adapted, devised or designed for use in bookmaking is a violation of the Federal law.

There is another statute referred to in this count of the indictment and that is Section 2, called "Aiding and Abetting."

Only the second part of this statute has reference

2484 to this particular count, but I will read it all, because we will be coming back to it later in connection with another count.

Section 2, reads as follows:

A, the first part: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Part B, the part which is applicable to this count: "Whoever willfully causes an act to be done, which is directly performed by him or another, would be an offense against the United States, is punishable as a principal."

In broad, general terms, this statute has the effect of making responsible one who directs an illegal act to be done or causes it to be done, just as if he had actually performed the act himself.

Now, to constitute the offense of knowingly depositing or causing to be deposited in the mail, it is necessary that the offending or accused party should be conscious of the physical act of depositing or causing to be deposited the material in the mail, and he should be aware that such paraphernalia is related to a bookmaking enterprise.

The word, "concerning," in the statute means pertaining to or having relation to.

2486 In connection with this count, the envelope addressed to Mr. Diulus has been admitted into evidence and I call your attention to the testimony of Mrs. Haney and what she said with respect to her part in mailing the envelopes and at whose direction it was done.

If you find beyond a reasonable doubt that Mr. Ianelli directed Mrs. Haney to mail out these rules, that he knew they were to be deposited in the mail, that this printing was, in fact, used or to be used or designed for use in bookmaking, then you would find him guilty of this count. If, on the other hand, the Government did not prove each element enumerated, that is, knowledge, direction and purpose of the use, then you would find him not guilty on this count.

Note, Mr. Diulus is not charged under this count for the mere receipt of the material, because that would not be illegal.

The second count lists all of the defendants. It is claimed that on and after October 16, 1970, up to and including March 25, 1971, that all of the defendants did knowingly and willfully conduct, finance, manage, supervise, direct and own an illegal gambling business, such business having a gross revenue of $2,000 or more on one or more single days, involving five or more persons in its conduct, financing, management, supervision, direction and ownership, and being in substantially continuous operation for a period in excess of thirty days; furthermore, that the
2487 business was in violation of the laws of Pennsylvania.

I had earlier read to you one of the Pennsylvania laws pertaining to gambling in connection with the sixth count of the indictment. You will recall that that one referred to those who engage in bookmaking or occupy any place with books for the purpose of recording or registering

bets, et cetera. I don't think it is necessary that I repeat it at this time.

The other Pennsylvania statute is Section 4601, which provides, in part, that whoever either publicly or privately sets up, opens, makes or causes any lottery, or is in any way concerned in the managing, conducting or carrying on the same, is guilty of an offense against the Commonwealth of Pennsylvania.

The word, "lottery," as used in this section, means any scheme whereby one on paying money to another becomes entitled to something of value or nothing, as determined by chance.

The main statute with which we are concerned, however, under the second count, is Section 1955 of the United States Code. Many of its provisions are incorporated in the indictment count itself, but it is necessary that we review this particular statute with some care.

The law reads:

"Whoever conducts, finances, manages supervises,
2488 directs or owns all or part of an illegal gambling business shall be guilty of an offense."

This is what the statute says is the offense, namely, conducting, and all of those other qualifications that I mentioned, managing, supervising, financing, directing, and so forth.

The special verdict slip which has been sent out to you gives a short summary of the first sentence after the listing of the count as to what that particular count applies to, and in Count 2, we have set out these particular words, and I want you to understand that any time hereafter, when I refer to Section 1955, and if I say, "conduct," et cetera, I am referring to conduct, finance, manage, supervise, direct and own, those categories. Those categories are set

out in the special verdict slip, too, so it is not necessary to keep repeating them all over and over again.

Now, Congress did not wish to regulate all gambling. It felt that much of this should be left to the States. It, accordingly, defined the illegal gambling business it sought to regulate as requiring the following conditions:

One, a violation of State law.

Two, that it involves five or more persons to conduct, finance, et cetera, and

Three, that it has been or remains in substantially continuous operation for a period in excess of thirty
2489 days or has a gross revenue of $2,000 in any single day.

Congress also defined gambling to include bookmaking and conducting numbers games.

Each and every one of these elements must be proved by the Government beyond a reasonable doubt as to each defendant. That is, again, you must consider each defendant's case individually.

It is not necessary that the Government charge five or more persons with the commission of this crime, but, rather, that the Government prove that any of the defendants were involved in the category described of the statute in the business with four or more other persons, some of whom may be defendants and others who may not be charged as defendants, but who also acted in the capacity that we have referred to so many times as conduct, finance, manage, supervise, direct or own.

It is not necessary for the Government to prove that each defendant was active in the illegal gambling business in these capacities for a period in excess of thirty days, but, rather, that the business itself was in operation for this period of time, or that the business itself grossed more than $2,000 in any one day.

It is necessary that each defendant who is charged, knowingly, willfully and intentionally performed the acts or caused to be performed, the acts to conduct, manage,
2490 finance, supervise, direct or own the gambling business. But it is not necessary for the Government to prove that each defendant who was active in the conduct, et cetera, of the business, knew or had reason to know of the identities of the other or all the other defendants or members of the business, or that each defendant knew or had reason to know, the identities of the five or more persons who were involved in this statutory categorization we have talked about, in the business.

Again, what the Government must prove is that there were five or more persons involved in the conduct of the business and in the categories I have mentioned, and the defendant took some part in its activity in one of those classifications set out in the statute.

Now, the Government has charged that Robert Ianelli conducted, managed, financed, supervised and directed the operation of the business. The prosecution contends that Dolores Ianelli conducted and managed in the business.

Maurice Orlanski and Philip Scolieri are said to have conducted or aided and abetted the operation of the business. Of course, if there is no evidence to establish the existence of such a business, then there could not be any crime of aiding and abetting. You can only aid and abet a crime which has been proved.

All of the other defendants are charged with conducting the business.

2491 The words, "managed, supervised and directed," should be given their ordinary meanings. That is, the words mean some activity in the nature of control, giving orders to others, watching the activities of those who might be considered in a subordinate position and, gen-

erally, assuming responsibility for the continued operation of the enterprise.

Aided and abetted, I have previously defined for you and read the statute to you.

The word, "conduct," as used in this statute, has a broader meaning than manage or direct. For example, you might say that an orchestra leader conducts the musicians; that is, gives orders and directions to them. But in the sense of this statute and the purpose to be accomplished, the word, "conduct," may be compared to "carrying on," an enterprise.

For example, we often say that two or three policemen conduct an investigation, meaning that they carried it on and were active in the progress of the work.

On the other hand, a person who walks into a bookmaking establishment or calls on the telephone for himself and wants to place a bet for himself would not be "conducting" the business, nor would he be within the class of those covered by this particular Act of Congress.

An accommodation bettor, who simply placed a bet for himself and another as a favor without anything in
2492 return, would not be in violation of the Act. In other words, the term, "conducts," is interpreted to apply to both the high-level bosses and street-level employees. It does not mean the mere player in an illegal game of chance, nor the person who participates in an illegal gambling activity merely by placing a bet.

In considering the evidence as it applies to all defendants, first of all, and in considering the number of people whom you may find to be involved in an illegal gambling business, if you find that to exist, I call your attention again to the testimony of Mr. McCullough who said he was paid so much per day for answering the telephones; that he

worked for Mr. Ianelli; that when Mr. Ianelli was out of town, Mr. Arnold Thomas helped out.

There is the testimony of Mrs. Haney, who said that she was paid by the Ianellis; that she sometimes called Mr. Ianelli and sometimes Mrs. Ianelli; that Mrs. Haney collected personally from a woman named "Edith," who received a percentage; that a person named "Louise," got a percentage of about thirty per cent; that there were a number of names of people on her list of names and phones numbers which had been offered into evidence in this case.

Again, those names are on one of the exhibits that will be sent out with you.

You will recall the length of time that Mr. McCul-
2493 lough and Mrs. Haney said they continued to be paid by Mr. Ianelli for working for him. With respect to the question of whether there was a business of five or more people, you may consider the testimony of Mr. McCullough and Mrs. Haney. Consider the persons about whom they testified, what these persons did. You should determine from your examination of the testimony of Mr. McCullough and Mrs. Haney, and the exhibits which have been admitted into evidence, if the Government has established the existence of a gambling business of five or more people continuing for a period of thirty days or more during the period charged in the indictment.

As I said before, in considering whether the requisite number of five has been met, you would not consider a person who was simply placing a bet for himself, but would consider only the people in the categories we have mentioned, that is, who conducted, managed, financed, supervised, directed or owned all or part of the business.

The statute provides that the gambling business must be in operation for thirty days or more or have a gross revenue of $2,000 or more per day. The Government has the option of proving either of these conditions. They need not prove both. Either one will suffice. The gross revenue,

which the statute talks about, you would find roughly equivalent to the amount of money that came in every day that was bet by the customers of the business, if you
2494 find the business existed.

Additionally, when considering the case of each defendant, you should consider whether admissions made during his telephone conversations by that particular defendant also implicated him as one of those who was active in the business, as the statute requires, and who, therefore, should be added to the number of other people to get to the total figure.

For sake of example only, and not to indicate in any fashion the way I think you should decide, suppose that you would determine through the testimony of Mr. McCullough and Mrs. Haney and other factors, that there were four people who acted in one of the stated capacities in the business. Then, when you come to the case of, let's say, Defendant Jones, you conclude that the telephone conversations of Mr. Jones convince you that he is also in one of those stated capacities in the business. You may, then, in considering Mr. Jones' case, add his name to the other four to come up with the five.

In considering Mr. Jones' case, however, you should not consider the conversations between Mr. Schultz and Mr. Ianelli, for example, because Mr. Jones was not a party to that conversation and Mr. Schultz's conversation could not affect Mr. Jones' case. This gets back to what I mentioned to you during the trial of the hearsay problem and the right of a defendant to confront a witness against him on the stand.

2495 Now, when you come to consider the cases of Mr. Ianelli and Mrs. Ianelli, you have a somewhat different situation, obviously, because it was their phone facility which was tapped and therefore they are alleged to have engaged in practically all of the conversations with the other defendants. Again, in Mr. Ianelli's case, when you

consider his guilt or innocence, his conversations could be used as admissions against himself with respect to whether the people he talked to were in one of the stated capacities in a business with Mr. Ianelli, as we have defined it.

Now, some issue has been raised about a lay-off bettor. If you find that a lay-off bettor was a part of the gambling business plan, and that lay-off betting was not simply because of an individual's desire to bet, rather, was necessary for the operation of a gambling business, that it was done so knowingly to further the gambling business, then you may consider the lay-off bettor as one of those in the stated capacity, that is, conducted, managed, directed, financed and so forth, and he would be subject to the same test as those who are alleged to be part of the gambling business in the capacities which I have mentioned to you.

I keep referring to these capacities mentioned by the statute so it will be very clear that in order to violate Section 1955, the defendants must fall within one of those categories that the statute sets out. If he happens to be
2496 a janitor for a gambling business and that is all he does, he is not in the category of conducting, owning, financing, managing, directing, and so forth. Any defendant to be found guilty of violating this particular Act, must be in one of those categories.

In considering the type of activity or enterprise involved, too, you are free to consider the fact that in addition to other matters, the telephone calls were made from the Ianelli phone to certain other defendants, these numbers having been furnished to you via the Northeast Recorders and pen register recordings which the FBI agents told us about.

In other words, while you may not consider, perhaps, what Mr. Schultz said as evidence against Mr. Jones, the fact that a phone conversation was had, or that the phone

call was made from Ianelli phone to Schultz, may be of some importance in the case in analyzing what happened in Mr. Jones' particular situation. You can see a difference between the fact that there is evidence a phone call was made to a certain point and considering what words were used by the person to whom that call was made. They are in separate categories.

Now, the "business," may be defined as some type of organization whose pri nary purpose was profit, which was run on some type of continuing and systematic basis to distinguish it, for example, from a single or sporadic transaction. However, Congress, by use of the word, did
2497 not necessarily imply that we must have the same type of formal structure as is common in ordinary business life, that is, a partnership, a sole proprietorship, or a corporation. Business in the sense of this statute, means any kind of organization which could function to furnish a profit in a gambling enterprise in a continuing series of transactions over a period of time.

I don't intend to review the calls or the evidence as to each defendant. I leave that to your recollection. In considering each defendant, you may take into account such things as the role of his activity, the volume of his transactions, the scope and size of his activity and whether they were conducted for a profit. The fact that individuals enter into similar enterprises, but do not work together under one roof, is not determinative of whether they are in business together. They may conduct their activities at great distances from each other and still be part of an overall organization, that being a business directed toward some purpose or end.

Individuals in the same business may, to a certain extent, compete for the profits and spoils of that business. As I have already told you, a business is directed towards a purpose or an end. Consider whether the defendants had a common purpose in their dealing with each other and con-

sider whether such purpose was substantial and necessary to each defendant.

As I mentioned earlier, you should consider the
2498 evidence which is applicable to all of the parties and then begin to narrow the case down to each one of the named defendants. Taking the evidence common to all, plus the admissions which may or may not have been made in conversations by that defendant with the Ianellis, are you satisfied beyond a reasonable doubt that a particular defendant engaged in an illegal gambling business as has been defined to you, that he knowingly and willfully engaged in the gambling business? If so, you would find that defendant guilty of that count. If the Government did not meet all the requirements by evidence beyond a reasonable doubt, then you would find as to that defendant, he was not quilty.

We have been going for some time. I think we will take a five-minute break before we conclude the instructions.

(Brief recess.)

The Court: In some ways, this is like a sermon in church. You sit so long and listen, and after awhile, you are so numb, you don't hear anything.

The first count is also brought against all of the defendants and it charges that there was a conspiracy existing between all of them and certain other persons who are not named as defendants, including McCullough and Haney, D'Amiano, Arnold Thomas, and others. These latter-named people are not defendants in this case.

The conspiracy, therefore alleged, is that all of the
2499 parties that I have talked about previously, combined, conspired, confederated, and agreed to conduct, finance, manage, supervise, direct and own an illegal gambling business in violation of Section 1955, the same statute which we just finished discussing.

In other words, the conspiracy count alleging that they planned to violate the same statute which is the subject

matter of the second count. When you talk about conspiracy, you are talking about an agreement.

The Government claims that in addition to the conducting, financing, managing, et cetera, the conspirators facilitated the conduct, financing, management, et cetera, of an unlawful activity. That is, an activity in violation of the gambling laws of Pennsylvania and the United States which I referred to previously, and that thereafter, the conspirators did perform and attempt to perform acts facilitating the conduct, financing, management, supervision and ownership of the illegal gambling business.

And then the indictment goes on to recite the five persons, the gross revenue and the period in excess of thirty days, as we discussed previously.

The Government alleges in the indictment that it was part of the conspiracy that Robert Ianelli hired employees, William Tice McCullough and Joanne Haney, to work in the business on a salary basis, and that others in the
2500 conspiracy worked on a commission basis. Again, as part of the conspiracy, it is claimed that Robert Ianelli had Joanne Haney mail the weekly football schedules and news to persons involved for the purpose of facilitating the dissemination of line and point spread information necessary to the operation of an illegal gambling business.

Even though the sending of weekly football schedules and news in and of itself is not an illegal activity, it may still form part of the conspiracy, because a conspiracy may be accompanied by acts which are innocent in themselves and legal in themselves, but which are used to bring about an illegal result.

For example, it would be perfectly legal and innocent to mail a Bible to a number of people. However, if this was part of a plan to further a gambling business, then that act could be part of the conspiracy.

The Government claims that Robert Ianelli and McCullough disseminated line and point spread information and accepted bets and wagers on sporting events from conspirators and others.

The prosecution also says that several of the conspirators would meet periodically among themselves and with others to exchange moneys due and owing as part of the gambling business.

The Government charges that Dolores Ianelli
2501 supervised, conducted, managed and directed that part of the illegal gambling business dealing with numbers bets and that she would and did receive over the telephone from certain of the conspirators the gross, net and balance figures of other conspirators, and that she also accepted numbers bets over the telephone.

As overt acts, the Government claims that in pursuance and in order to further the objects and designs of the conspiracy, the conspirators communicated by a number of telephone calls. I don't think it is necessary that I repeat these particular calls, since they are many and you have heard them.

First of all, let's start off with what the law says a conspiracy is. Section 371 of Title 18, United States Code, provides in part:

"If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to affect the object of the conspiracy, each is guilty of an offense against the United States."

The essence of conspiracy is an agreement by two or more persons to combine efforts for an illegal purpose and the performance of at least one of the over acts charged by one of the defendants or co-conspirators in furtherance of the agreement. In other words, for a conspiracy, you must have an agreement and you must have some act done in furtherance of the conspiracy.

2502 The mere agreement by two people without anything more is not a crime. In addition to agreeing, they must do something. It is not necessary, however, that two persons should meet together and enter into a formal or explicit agreement, either orally or in writing, stating the formation of the conspiracy or the details or means by which the unlawful scheme is to be carried out. You may consider the acts and conduct of the individuals to determine if there was an unlawful agreement. It is generally a matter of inference.

Let me point out, however, that neither association with conspirators nor mere knowledge of illegal activity constitutes proof of participation in a conspiracy, nor is mere aid or assistance given by a defendant to another to violate the law sufficient to justify conviction for conspiracy, unless such aid is given for the purpose of carrying out the unlawful design of a conspiracy agreed to by him and the others.

Four essential elements are required to be proved in order to establish the offense of conspiracy. First, that the conspiracy described in the indictment, that is, to violate Section 1955, was willfully formed and was existing at or about the period extending from the 16th day of October, to March 25, 1971. It need not have been in existence during the whole time. Second, that the particular defendant, whom you are considering at the time, willfully became a member of the conspiracy. Third, that one of the
2503 conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; and fourth, that the overt act was knowingly done in furtherance of some object or purpose of the conspiracy.

It is not necessary that each person alleged to be a member of the conspiracy do an overt act. An overt act need be done by only one of the conspirators in furtherance of some object or purpose of the conspiracy in order to make the offense complete. But if an act is done by one who is

not a member of a conspiracy, the commission of the overt act would not make that person guilty of conspiracy.

One may become a member of a conspiracy without full knowledge of all the details. On the other hand, a person could have no knowledge of a conspiracy but happen to act in a way which furthers some object or purpose of the conspiracy, but he would not thereby become a conspirator.

Before you may find that a defendant or any other person has become a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person claimed to have been a member willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. Mere knowledge by the other defendants that the law was being violated, without their joining in an agreement to violate the law, is not sufficient to spell out the crime of conspiracy.

2504 To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something which the law forbids, or with specific intent to fail to do something the law requires to be done. That is to say, to act or participate with the bad purpose either to disobey or to disregard the law.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy. Or to paraphrase it, a late joiner is just as guilty as the charter member.

I have use the words, "overt act," a number of times. It is defined as follows: It is an act knowingly committed by one of the conspirators in an effort to affect or to accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street or

driving an automobile or using a telephone. It must, however, be an act which follows and intends to look toward accomplishment of the plan or scheme and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

A person cannot conspire with himself. There
2505 must always be at least two persons.

May I call your attention to the fact that while Section 1955, the illegal gambling law, requires that the gambling consist of five or more people, the conspiracy count requires the participation of only two people. Just to illustrate the point, and again, without attempting in any way to give any impression to you, which I am not, I am simply trying to explain the concept here. It is theoretically possible that two people could conspire to form a business of five or more. It would be theoretically possible, too, that if the business were underway and only reached a total of four, that there would be no violation of Section 1955, but there still could be a conspiracy charge on the part of those who planned the agreement to ultimately make a business of five, even though they never actually reached five.

So, there would be conspiracy, even though the law which they planned to violate had never really been violated.

It is not necessary that the participation of an accused in a conspiracy be shown by direct evidence. The connection may be shown by such facts and circumstances in evidence as legitimately can sustain that inference. However, the mere fact that nine persons are on trial together cannot be considered in any way as indicating that they participated in a common plan, agreement or conspiracy to violate the law. There can be no conspiracy without a corrupt agreement or understanding.

2506 Well, any statement of any conspirator which is not in furtherance of the conspiracy or which was made

before the conspiracy came into existence or which was made after the conspiracy terminated, may be considered as evidence only against the persons who made the statement.

If you once determine, however, after reviewing the evidence that conspiracy exists, and that the defendants or the defendant whom you happen to be considering at the time were members of it, then as to those who you find were members of the conspiracy, you may consider the declarations of others who were also members as evidence to aid you in determining if there is guilt proved beyond a reasonable doubt.

Remember, for this situation to apply, you must determine one, a conspiracy existed; two, that the particular defendant whose guilt you are considering was a member, and then you may consider the hearsay statements made during the course of the conspiracy in furtherance of the conspiracy by another member of the conspiracy.

Now, this is why I start off with the other counts and work toward the first count. That evidence would not be admissible in proving guilt under the second count, but it could be admissible under the circumstances I just enumerated with you in proving the guilt of conspiracy.

To be a member of a conspiracy, one need not know
2507 all the details of it, nor need one know all the members of the conspiracy. Mere similarity of conduct among various persons, the fact that they may be associated or friendly or know each other, does not necessarily establish the existence of a conspiracy.

What the evidence must show beyond a reasonable doubt to establish a conspiracy, is that the members in some way or another, or in some manner or through some contrivance, postively or tacitly, that is perhaps without even saying a word or even mentioning it between them, came to a mutual understanding to try to accomplish the mutual plan.

The intent to form the conspiracy must be over and above that to accomplish the underlying or substantive offense of violating Section 1955.

Now, there is a further question that the conspiracy must be a single plan. If there is a series of separate, unrelated conspiracies, then the Government would not have proved its case, because it charges one conspiracy. And, therefore, the question would be, does this agreement as part of the conspiracy, have a common end or single unified purpose. It will be up to you to determine if you find the evidence sufficient to establish a single conspiracy, that there was overlapping of members and activities and everything was directed toward a single, common goal.

* * * * * * * * * * *

SUPPLEMENTAL CHARGE OF THE DISTRICT COURT

2516 For violation of Section 1955, three elements are required. First, violation of State law; second, involving five or more persons who conduct, finance, manage, supervise or own all or part of the business; and the third category is in operation or has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

Now, that third category offers an option. Either one is sufficient to fill the third category. That is, the
2517 Government may either prove the thirty days continuous operation, or gross revenue of $2,000 in a day to satisfy that third category.

I will run them over again. The three categories, violation of State law, five or more people whose capacities we have talked about so many times and, third, either thirty days or $2,000.

* * * * * * * * * * *

SUPREME COURT, U. S.
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No. 73-64

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT E. IANNELLI, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. IANNELLI, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge the validity of a court ordered wire interception on the ground that proper procedures were not followed within the Department of Justice for authorizing the submission to the court of the application for the wire interception order. They also contend that the indictment and punishment for violation of both 18 U.S.C. 371 and 1955 was improper.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiring with ten unindicted co-conspirators to conduct an illegal gambling business in violation of 18 U.S.C. 371, and of conducting such business in violation of 18 U.S.C. 1955. Petitioner Iannelli was also convicted of sending gambling paraphernalia through the mail and mail fraud in violation of 18 U.S.C. 1302 and 1342.[1] On the substantive counts,

[1] The jury was unable to reach a verdict as to one codefendant, who was retried and convicted. See *Dolores Iannelli* v. *United States*, No. 73-103, petition for certiorari pending. Four other codefendants were acquitted.

petitioner Iannelli was fined a total of $22,000 and one-eighth of the cost of the prosecution and sentenced to concurrent two and three year terms of imprisonment to be followed by a five year probation term; petitioners Diulus, Orlanski and Scolieri were each fined $15,000 and one-eighth of the cost of prosecution and sentenced to a two year term of imprisonment to be followed by a three year probation term; petitioner Fusaro was fined $10,000 and one-eighth of the cost of prosecution and sentenced to an eighteen month term of imprisonment, suspended on condition that he spend six months in a jail-type institution to be followed by a three year probation term; petitioners Cancilla, Cammarata and Gobos were each fined $10,000 and one-eighth of the cost of prosecution and sentenced to an eighteen month term of imprisonment, suspended on condition that they spend three months in a jail-type institution to be followed by a three year probation term. On the conspiracy count, each petitioner was sentenced to a five year probation term to commence after imprisonment and to run concurrently with the other probation term imposed. The court of appeals affirmed (Pet. App. 23a-27a).

The evidence, much of which was based on a court ordered wire interception, showed that in the period between October 16, 1970 and March 25, 1971, petitioners conspired with ten others to and did receive and disseminate line and point-spread information; they also accepted more than $2,000 per day worth of bets and wagers on sporting events. These activities were in violation of the laws of the Commonwealth of Pennsylvania, Section 4601 and 4607, Title 18, Purdon's Pennsylvania Statutes.

1. The wire interception evidence in this case was obtained from a court authorized interception conducted

pursuant to Title III, Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520). The general procedure under which the application for the wire interception order was authorized is set forth in our brief and petition in *United States* v. *Giordano*, No. 72-1057, certiorari granted March 26, 1973. In the instant case the government showed by affidavits and depositions that the wiretap application was personally approved by then Attorney General John N. Mitchell who personally initialed the authorization memorandum.[2]

Under the standard procedure which was followed in this case, the Attorney General approved the application for an interception order. A letter was then dispatched to the attorney in the field notifying him that he was authorized to apply for the interception order. Such letters were sent in the name of Assistant Attorney General Will Wilson, and attached to the application. These letters seemed to indicate, erroneously, that it was Assistant Attorney General Will Wilson who was authorizing the application. Mr. Wilson's signature was affixed to these letters by one of his two Deputy Assistant Attorneys' General in accordance with the authorization of Mr. Wilson and the standard procedure of the Criminal Division.[3]

Petitioner claims that the evidence from the wire interceptions should have been suppressed because the authorization and identification procedures within the Department of Justice did not comply with the statute.

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[2] Contrary to petitioners' claim that the record contains a "mere assumption" that the Attorney General personally authorized the application (Pet. 5), the district court specifically so found on the basis of adequate evidence (Pet. App. 3a-4a).

[3] Mr. Wilson's signature was affixed in this case by former Deputy Assistant Attorney General Henry E. Petersen.

As petitioner points out, this case presents the same issues which are before this court in *United States* v. *Chavez*, No. 72-1319, certiorari granted May 21, 1973, and *United States* v. *Giordano*, No. 72-1057, certiorari granted March 26, 1973. Therefore, the disposition of this issue in the instant case should await the disposition of those cases.

2. Petitioners also argue that 18 U.S.C. 371 and 18 U.S.C. 1955 do not charge different offenses, and therefore, under "Wharton's rule" it was improper to prosecute and punish them for both the conspiracy and the substantive offenses.

Wharton's rule states that "where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, * * * or under the federal statute." *Gebardi* v. *United States*, 287 U.S. 112, 122 (citations omitted). We have found no case in which that rule has been applied by this Court.

Instead, in *Callanan* v. *United States*, 364 U.S. 587, 593-594, the Court emphasized the importance of the general principle permitting separate punishment for conspiracy and for the substantive offense:

> This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

See also *United States* v. *Rabinowich*, 238 U.S. 78, 88; *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 923-925, 955-956 (1959).

In any event, Wharton's rule, which is a narrow exception to this general principle, is inapplicable to the facts of this case, since it is possible to commit the substantive offense condemned by 18 U.S.C. 1955 without cooperative illegal action.[4] Although 18 U.S.C. 1955(b)(ii) requires that the gambling business involve five or more persons, there is no requirement that these persons conspire together to commit an offense against the United States. Thus, 18 U.S.C. 1955 could be violated by a single gambling operator who used four or more innocent people to collect receipts or otherwise unknow-

[4] Cf. *United States* v. *Bobo* Nos. 71-2077, 2078, 2079 (C.A. 4), decided April 23, 1973, petition for certiorari pending *sub nom. Gray* v. *United States*, No. 73-231, in which the court concludes that Wharton's rule does not apply to a conspiracy to violate 18 U.S.C. 1955. Instead, the court notes, the rule applies only when the following elements coexist: "the immediate effect of the act in view, which is the gist of the substantive offense, reaches only the participants therein; the agreement of the participants is necessary for the completion of the substantive offense; and the conspiracy must be in such close connection with the substantive offense as to be inseparable from it" (slip op. 35).

ingly further his enterprise. There is no indication in the legislative history of 18 U.S.C. 1955 that Congress intended the jurisdictional requirement of group activity by five or more individuals to entail proof of an agreement among those individuals to violate the gambling laws. H. Rep. No. 91-1549, 91st Cong., 2nd Sess., 1970 U.S. Code Cong. & Adm. News 4029-4030. Instead, the requirement related only to the determination whether the gambling activity was substantial enough to warrant federal prosecution. In such circumstances, it is particularly inappropriate to make the assumption which underlies Wharton's rule that the legislature intended, by defining a substantive offense which necessarily requires illicit cooperation, to preclude the applicability of conspiracy sanctions to that activity. Because each offense involves an element not required by the other, it was proper to charge and punish each separately. *Blockburger* v. *United States*, 284 U.S. 299, 304; *Pinkerton* v. *United States*, 328 U.S. 640, 643-644.

Even if 18 U.S.C. 1955 were held to require proof of an agreement among the five participants to commit a gambling offense, many more than five participants are involved here. Wharton's rule does not apply when non-essential participants are involved in the conspiracy or the substantive offense. *United States* v. *Becker*, 461 F. 2d 230, 234 (C.A. 2), petition for certiorari pending, No. 72-158.[5] 1 Anderson, *Wharton's Criminal Law and Procedure*, Section 89, p. 193 (1957); 2 *Wharton's Criminal Law*, Section 1604, p. 1862 (12th ed. 1932). Thus, we submit that the court below correctly disposed of this issue.

[5] The issue of the applicability of Wharton's rule is not raised in the petition for certiorari.

We recognize, however, that the opinion below is inconsistent with the decision of the United States Court of Appeals for the Seventh Circuit in *United States* v. *Hunter*, petition for certiorari pending, No. 73-101.[6] The court in *Hunter* refused to follow the decision in *United States* v. *Becker*, 461 F. 2d 231 (C.A. 2), which held Wharton's rule inapplicable to a violation of 18 U.S.C. 1955 involving more than five persons.[7] Because of the conflict in the circuits and the significance of this issue to the interpretation of 18 U.S.C. 1955, we do not oppose the granting of a writ of certiorari in this case.

The Court may wish to defer disposition of this petition until after the decisions in *United States* v. *Giordano*, *supra*, and *United States* v. *Chavez*, *supra*. Alternatively, we suggest the Court may wish to grant the petition now, with the understanding that the parties will brief and argue the issue of the applicability of Wharton's rule only, reserving the issue concerning the authorization of the interceptions to be controlled by the decisions in *Giordano* and *Chavez*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

[6] The government's request for an extension of time to cross-petition on this issue in *Hunter* was denied by Mr. Justice Rehnquist on July 9, 1973.

[7] As already noted, *United States* v. *Bobo* (C.A. 4), *supra*, petition for certiorari pending *sub nom. Gray* v. *United States*, No. 73-231, is in accord with *Becker* and the decision below. Two district court cases in other circuits reached the same result as the court in *Hunter*. See *United States* v. *Figueredo*, 350 F. Supp. 1031 (M.D. Fla.), notice of appeal filed December 9, 1972; *United States* v. *Greenberg*, 334 F. Supp. 1092 (N.D. Ohio).

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v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In his Memorandum for the United States, the Solicitor General has recommended a limited grant of certiorari confined to the issue of the applicability of Wharton's rule. (S.G. Memo, p. 7) While we are gratified that the Solicitor General agrees with us that this issue is of sufficient importance to warrant a grant of certiorari, we respectfully submit that certiorari should also be granted as to the wire interception issue raised by our petition.

The propriety of the authorization procedures utilized by the Department of Justice in securing judicial approval of wire interceptions will be reviewed by this

Court in *United States* v. *Chavez,* No. 72-1319, certiorari granted May 21, 1973, and *United States* v. *Giordano,* No. 72-1057, certiorari granted March 26, 1973. The instant case presents an important evidentiary question not present in *Chavez, supra,* or *Giordano, supra* which should be resolved by this Court at the same time.

The important question in this case which is not found in either *Chavez, supra* or *Giordano, supra,* is: where the propriety of the authorization procedure has been put in issue, who has the burden of proof and what quantum of evidence is necessary to satisfy the burden? In both *Chavez, supra* and *Giordano, supra,* the record is quite clear as to precisely who did what in the various steps of the authorization procedure. While the Solicitor General points out that the district court specifically found that the Attorney General personally authorized the application (S.G. Memo n. 2, p. 3), the question here is whether such a finding was based upon adequate evidence.

Whether the Attorney General personally authorized the application was and is of critical importance in this case. In this case unlike many others in which this question has arisen the Justice Department has not submitted an affidavit from the Attorney General. Affidavits were submitted by Henry Peterson and Sol Lindenbaum and a copy of a memorandum from the Attorney General to Will Wilson allegedly bearing Mr. Mitchell's initials was produced with Lindenbaum's affidavit. (111A). In a deposition Mr. Lindenbaum disclosed that he had never seen the Attorney General initial the memo and that he actually did not know who placed the initials on the memo. (407A, 411A).

In discussing the problems of proof of authentication of documents, McCormick points out that the simplest method of proof is to call a witness who saw the signator sign the offered writing or call the purported signator himself. *McCormick on Evidence,* § 187 (1954 ed.) In this case no such evidence was offered by the Government. Petitioners here are somewhat loath to embark upon a series of lengthy prison terms founded upon a posit of faith rather than proof of facts.

Once an irregularity has been established in the authorization process, as it was here, it is submitted that the burden is on the government to come forward with competent evidence to prove its compliance with the requirements of the statute. The best evidence of what the Attorney General did or did not do is his own testimony; the minimum evidence that should be required is the testimony of an eyewitness to the event.

This court has already recognized the importance of the issues raised by *Chavez, supra* and *Giordano, supra.* It is respectfully urged that the concomitant evidentiary problems raised by the facts of this case are of sufficient importance to warrant resolution by this Court in conjunction with its determination of *Chavez, supra* and *Giordano, supra.* For this reason we respectfully request that certiorari be granted as to both of the questions presented by our petition.

Respectfully submitted,

JAMES E. MCLAUGHLIN
Attorney for Petitioners

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---

BRIEF FOR PETITIONERS

On May 28, 1974, this court issued a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 4, 1973.

OPINIONS BELOW

The opinion of the District Court for the Western District of Pennsylvania is reported at 339 F. Supp. 171 and is reprinted in the Appendix to our petition for certiorari at p. 1a. By inadvertence the oral opinion of the district court, which was never reported and did not purport to be a formal opinion, was omitted from the applicants' petition and the single appendix. It is

printed as a supplemental appendix to petitioners' brief. The opinion of the United States Court of Appeals for the Third Circuit is reported at 477 F.2d 999 and is reprinted in the appendix to our petition for certiorari at p. 23a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1973. A timely petition for rehearing was filed and was denied June 6, 1973. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). A timely petition for certiorari was filed July 5, 1973, and was granted May 28, 1974.

STATUTES INVOLVED

18 U.S.C. 371 provides, in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 1955 provides, in pertinent part:

§ 1955. Prohibition of illegal gambling business

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to poolselling bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receive gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

QUESTION PRESENTED

Whether petitioners were properly indicated for and convicted of conspiracy to violate 18 U.S.C. 1955 when they were also indicted for and convicted of the substantive violation of 18 U.S.C. 1955.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiring among themselves and with eleven unindicted coconspirators to conduct an illegal gambling business in violation of 18 U.S.C. 371, and of conducting such business in violation of 18 U.S.C. 1955. (7a) Petitioner Iannelli was also convicted of sending gambling paraphanelia through the mail and mail fraud in violation of 18 U.S.C. 1302 and 1341. Prior to trial the indictment as to one deceased defendant was dismissed. A judgment of acquittal was granted as to four co-defendants at the close of the government's case. (7a) The jury was unable to agree as to one co-defendant and a mistrial was declared as to her. (7a)

On the substantive counts petitioner Iannelli was fined a total of $22,000 and one-eighth of the cost of prosecution and sentenced to concurrent two and three-year terms of imprisonment to be followed by a five-year probation term. Petitioners Diulus, Orlansky, and Scolieri were each fined $15,000 and one-eighth of the cost of prosecution and sentenced to a two-year term of imprisonment to be followed by a three-year probation term. Petitioner Fusaro was fined $10,000 and one-eighth of the cost of prosecution and sentenced to an eighteen-month term of imprisonment, suspended on condition that he spend six months in a jail-type institution to be followed by a three-year probation term. Petitioners Cancilla, Cammarata, and Gobos were each fined $10,000 and one-eighth the cost of prosecution and sentenced to an eighteen-month term of imprisonment, suspended on condition that they spend

three months in a jail-type institution to be followed by a three-year probation term. All of the fines were committed fines. (9a-11a)

On the conspiracy count, each petitioner was sentenced to a five-year probation term to commence after imprisonment and to run concurrently with the other probation term imposed. (9a-11a) The Court of Appeals affirmed. (Pet. App. 23a-27a).

As indicated by the opinion of the district court the case was a complex one and much of the government's evidence was based upon a court-authorized wire-interception. (Pet. App. 1a) The question of the duplicity between the conspiracy count and the substantive count charging violation of 18 U.S.C. 1955 was raised by the defendants in pre-trial motions and a ruling on this question was deferred until the close of the government's case. (Pet. App. 19a, 20a). Although the indictment charged the petitioners with conspiring to violate 18 U.S.C. 1302 and 18 U.S.C. 1952 as well as 18 U.S.C. 1955, the court in its final charge to the jury eliminated the § 1302 and § 1952 violations from the conspiracy count and confined his charge solely to a charge of conspiracy to violate 18 U.S.C. 1955. (55a)

SUMMARY OF ARGUMENT

In 1850 Wharton's Rule was first applied to dismiss a charge of conspiracy to commit adultery. *Shannon* v. *Commonwealth,* 14 Pa. 226 (1850). The reason for the dismissal of the conspiracy charge in *Shannon, supra.,* was, that where the completion of the substantive crime requires a plurality of agents the charge of conspiracy will not lie.

In 1970 the Congress of the United States enacted the *Organized* Crime Control Act of 1970 of which § 1955 was an integral part. The purpose of § 1955 of this statute was to permit federal prosecution and punishment of participants in illegal gambling enterprises involving a minimum of five persons or more (bettors are excluded) which have been in substantially continuous operation for more than thirty days or have grossed more than $2,000 on a single day.

In 1971 the petitioners here were indicted for conspiracy to violate the newly enacted § 1955 of the United States Code and were indicted as well for the substantive violation of the same statute. Since plurality of action is required by the terms of § 1955 the petitioners here and others similarly charged in other jurisdictions raised the issue of the merger of offenses under Wharton's Rule.

It is the contention of the petitioners here that § 1955 requires the concerted action of a minimum of five persons to make the substantive violation a completed federal crime. In order to satisfy the statutory requirements of § 1955 a minimum of five must be intentional participants in an illegal gambling enterprise. If a minimum of five persons wilfully cooperate in such an illegal enterprise they must have done so by means of some agreement however tacit that may have been. Whatever the nature of the agreement of the five or more persons contemplated by § 1955, it is, in essence, a conspiracy. In this case the petitioners have been convicted of and have had imposed upon them additional penalties by reason of their conspiracy convictions. It is precisely this situation that Wharton's Rule was formulated to prevent.

While Wharton's Rule has never actually been applied by this Court it has been cited with approval by it. *Gebardi* v. *United States,* 287 U.S. 112, 122 (1932). The applicability of Wharton's Rule to fact situations such as the instant one has resulted in a conflict in the circuits. The Seventh Circuit, in *United States* v. *Hunter,* 478 F.2d 1019 (1973) has held that Wharton's Rule bars a conviction for conspiracy to violate 18 U.S.C. 1955 when there has also been a conviction of the substantive offense. A similar result was reached in *United States* v. *Whitaker,* 372 F. Supp. 154 (M.D.Pa. 1974). It is our view that these Opinions are the only well-reasoned ones dealing with the subject.

Since under a proper application of Wharton's Rule the offenses merge, it is our connection that it was error to submit the conspiracy count to the jury at all and the error was of such grave dimension that the petitioners here are entitled to a new trial.

ARGUMENT

Since the enactment of 18 U.S.C. in 1970, dual prosecutions for conspiracy to violate § 1955 coupled with the charge of substantively violating the same statute have become increasingly popular with federal prosecutors. With the proliferation of these dual prosecutions defendants faced with such prosecutions have, in increasing numbers questioned the propriety of this practice in a number of our federal jurisdictions. Because there is presently a conflict in the circuits and in vairous district courts, the Solicitor General saw fit not to oppose this petition.

I. The Basic Problem.

Simply stated it is petitioner's contention that the application of Wharton's Rule bars a conviction for conspiracy to violate 18 U.S.C. 1955 when coupled with a conviction for the substantive violation of 18 U.S.C. 1955.

Wharton's Rule provides:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained."
>
> 2 F. Wharton, Criminal Law § 1604, at 1862 (12th Ed. 1932).

This concept is now new to the law; it was applied as early as 1850 in the case of *Shannon* v. *Commonwealth,* 14 Pa. 226, and has been noted with approval by this court in the case of *Gebardi* v. *United States,* 287 U.S. 112 (1932) where this court stated:

> ". . . where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statute."
>
> 287 U.S. 112, at 122.

In 1943 the Second Circuit commented:

> "If a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it."
>
> *United States* v. *Zeuli,* 137 F.2d 845, 846 (2d. Cir. 1943).

Wharton's Rule has found its most frequent application in cases involving adultery, abortion, incest, and dueling, in which offenses concert of action between two participants is absolutely essential to the commission of the offense. Since dueling has fallen out of fashion and adultery and abortion are now fashionable but seldom prosecuted, the Rule has lain relatively dormant for want of practical application.

II. The Role of Wharton's Rule Today.

As a result of its concern to find more effective methods to deal with organized crime, Congress in 1970 passed the Organized Crime Control Act of 1970, a pertinent portion of which is embodied in 18 U.S.C. 1955 dealing with syndicated gambling. This section of the Act permits federal prosecutions of anyone who "conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business. . ." An illegal gambling business is defined by the statute as one which:

(i) is a violation of the law of a state or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such a business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

As might be expected the incursion of the federal prosecutorial system into purely intra-state gambling activities gave birth to numerous federal indictments involving hundreds of defendants in the various federal

districts of these United States. As with any new legislative scheme involving criminal sanctions, the passage of 18 U.S.C. 1955 spawned many new legal problems and, as in this case, created new interest in the still viable but slumbering teaching of Wharton's Rule.

In order for a conviction to be sustained under 18 U.S.C. 1955 the government must prove that five or more persons were engaged in the operation of an illegal gambling enterprise. In order to sustain a conviction of conspiracy to violate 18 U.S.C. 1955 the government must prove that two or more persons agreed or conspired to operate an illegal gambling enterprise involving a minimum of five persons. That plurality of agents is necessary to make out the substantive violation of § 1955 or a conspiracy to violate it would seem to be so clear as to be beyond cavil. Thus some courts when faced with the problem of the merger or duplicity of these offenses under Wharton's Rule have properly recognized and applied the rule.

In *United States* v. *Hunter,* 478 F.2d 1019 (7th Cir. 1973) fourteen defendants were indicted in a two count indictment charging conspiracy to violate 18 U.S.C. 1955 and also for substantively violating 18 U.S.C. 1955. Only two stood trial and each was found guilty as to both counts. The Court of Appeals reversed the conspiracy conviction holding inter alia:

> "In the case before us, both alleged offenses require 'the mutual cooperation' or the 'reciprocal action' of a plurality of persons. The conspiracy charged in Count I is confined to the transactions described in Count II as a violation of § 1955; the conspiracy covers nothing more than the substantive crime committed by the conspirators. There

> is no suggestion that the proof of intent required for the violation of § 1955 is any different from the evidence required to sustain the charge of conspiracy.
>
> It is true, as the government argues, that the conspiracy charge encompasses more than five persons, the number *required* for a violation of § 1955. It is also true, and equally significant, that the substantive charge encompasses more than two persons, the number *required* for violation of § 371. But an argument which merely emphasizes the number of persons charged in the indictment does not identify an element of each offense which adequately differentiates the other. Two or more may be guilty of conspiracy; five or more may be guilty of either conspiracy or the substantive crime. But even though five or more persons are named in the indictment, a charge of conspiracy to violate § 1955 may not be maintained if it comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself. We think this conclusion is a fair interpretation of congressional intent, is supported by the considerations which normally require that an attempt merge with a completed offense, and is consistent with the general rule that conspiracy is a crime separate from the individual substantive offense or offenses which the conspirators intended. We find 'no ingredient in the conspiracy (charged in Count I) which is not present in the completed crime (charged in Count II).
>
> *Pinkerton* v. *United States,* 328 U.S. 640, 643, 66 S. Ct. 1180, 1182, 90 L. Ed. 1489."

In *United States* v. *Greenberg,* 384 F. Supp. 1092 (1971), the United States District Court for the Northern District of Ohio, considered the problem of one Anthony Arnone who was charged with the dual

violation of conspiracy to violate 18 U.S.C. 1955 and the substantive violation of the same statute. In a carefully considered analysis of Wharton's Rule as it applied to that case, the court dismissed the conspiracy indictments on pre-trial motions. Approximately one year later the District Court for the Middle District of Florida arrived at a similar conclusion when Judge Krentzman dismissed a conspiracy indictment against eight defendants charged with conspiracy to violate § 1955 as well as the substantive violation of the statute. *United States* v. *Figueredo,* 350 F. Supp. 1031 (1972), reversed, *United States* v. *Vaglica,* 490 F.2d 799 (5th Cir. 1974), petition for certiorari pending *sub nom, Scaglione* v. *United States,* No. 73-1503 October Term, 1973. While Judge Krentzman's decision in *Figueredo, supra.,* may have been denuded of regional authority by its reversal by the subsequent decision of the Court of Appeals for the Fifth Circuit, it has by no means been shorn of the persuasiveness of its logic.

In February of 1974, Judge Muir of the Middle District of Pennsylvania, applied Wharton's Rule and granted judgment of acquittal as to the conspiracy count in a dual conviction of conspiracy and of the substantive offense. Judge Muir found that there was no element in the conspiracy which was not present in the completed crime. *United States* v. *Whitaker,* 372 F. Supp. 154 (M.D. Pa. 1974). In that case five defendants were charged with conspiring to violate § 1955. Since there were only five the court distinguished that case from the instant one and declined to follow the holding of the Third Circuit in this case.

While the aformentioned courts have accorded Wharton's Rule its proper due, a number of others

have not. The Courts of Appeals for the Second, Third, Fourth and Fifth Circuits have held that the conspiracy and substantive counts do not merge in this situation.

The first circuit court to deal with this particular problem was the Second Circuit. In *United States* v. *Becker,* 461 F.2d 230 (2nd Cir. 1972), petition for certiorari pending, No. 72-158, the court held that, because there were seven people in the conspiracy rather than five, Wharton's Rule could not apply. Here the court mistakenly applied what is known as the "third person" exception to Wharton's Rule. The flaws in the *Becker* court's reasoning were lucidly delineated by Judge Krentzman in *Figueredo, supra.,* at p. 1035. The *Becker* decision was also weighed and found wanting by the authors of two recent law review notes. 30 Wash. & Lee L. Rev. 613, 621 (1973); 59 Iowa L. Rev. 452, 463 (1973). In spite of its faulty reasoning, *Becker* became precedent for a number of cases which were to follow.

In the instant case the Third Circuit followed *Becker, supra.,* implicitly and concluded that, since there were more than five defendants, Wharton's Rule could not apply. *United States* v. *Iannelli,* 477 F.2d 999, 1002 (3d. Cir. 1973).

The same problem arose in the Fourth Circuit at or about the same time it arose in the Third. In *United States* v. *Bobo,* 477 F.2d 974 (4th Cir. 1973), petition for certiorari pending *sub nom. Gray* v. *United States,* No. 72-231, the court held that Wharton's Rule was not applicable and of course cited the *Becker* decision. However, although there were eleven indictees in *Bobo,* the court there did not make magic out of mere num-

bers for it went on to inject some new misconceptions into the problem. The court said at p. 987:

> "We are of the opinion that the following elements must co-exist or else the rule may not apply: the immediate effect of the act in view, which is the gist of the substantive offense, reaches only the participants therein; the agreement of the participants is necessary for the completion of the substantive offense; and the conspiracy must be in such close connection with the substantive offense as to be inseparable from it."

It then went on to find that since bettors are involved in gambling the substantive offense reached persons other than the participants; that a gambling business may be operated without the agreement of the five persons required to be involved; and the conspiracy is not in such close connection with the operation of the gambling business as to be inseparable from it.

The introduction of the role of the bettor into this situation is a novel as it is specious. The gist of the substantive offense is the operation of a gambling business by five or more persons, all of whom under the statute are subject to the same penalty. Bettors are not within the statutory scheme at all. The court's conclusion that no agreement is necessary between the five or more who run the gambling business is astonishing. It is difficult to see how the five or more could have the requisite intention to be in the gambling business in the absence of an agreement to be in the business. Gambling businesses do not draft employees into their ranks; they seek only voluntary enlistments and such enlistments are obviously the result of some type of tacit agreement. Equally mystifying is the court's conclusion that the requisite close connection

between the gambling business and the conspiracy is lacking. There is no element in the conspiracy that is not present in the substantive offense. The conspiracy and the gambling business are identical. This identity of elements was the basis of the holdings in *Hunter, supra.*, and *Whitaker, supra.*

In 1974, the Fifth Circuit made its own contribution to the confusion surrounding the problem. In *United States* v. *Pacheco,* 489 F.2d 554 (5th Cir. 1974) the court affirmed dual convictions for conspiracy to violate § 1955 and the substantive offense and refused to apply Wharton's Rule. In that case fifty-eight defendants were indicted on a two count indictment charging conspiracy to violate and the substantive violation of § 1955. It appears that only four of the defendants went to trial and the appeal in the Circuit involved only two. While citing *Becker, supra.*, and its progeny *Iannelli, supra.*, the court in *Pacheco* travelled a different route in order to arrive at a similarly erroneous result.

In *Pacheco* the court found that the requirement of five or more persons was purely jurisdictional and thus concerted action was not required by § 1955. The court said at p. 559:

> "Wharton's Rule is applicable only when more than one party is necessary to perform the basic crime. It prevents prosecution for conspiracy only where the proscribed type of conduct cannot take place without such concert of action. The basic conduct prohibited by section 1955, however—the operation of an illegal gambling business—does not require concert of action."

It is submitted that this conclusion by the court is an attempt to create a distinction without a difference.

While the requirement of five or more persons was included in the act in order to deal with gambling of major proportions, unless five or more intentionally act in the furtherance of a common illegal gambling enterprise, there is no federal crime at all. *United States* v. *Whitaker, supra.* Just as surely as it takes two to tango, it takes a minimum of five to give the government a trot here. The "basic crime" with which we are dealing here is denominated in the title of § 1955 as "Syndicated Gambling" which by its very definition requires the concerted action of more than one person.

The court in *Pacheco, supra.,* does not even advert to the carefully reasoned opinion of its own District Judge Krentzman in the *Figueredo* case. The decision of the Seventh Circuit in *Hunter, supra.,* is dealt with in a footnote which finds that in the *Pacheco* record there is some element of aggravated criminality. What this mysterious element of aggravated criminality is, is not disclosed although it may be that the *Pacheco* panel attached some talismanic quality to the fact that fifty-eight people were indicted in that single indictment.

The *Pacheco* decision was followed in the Fifth Circuit by a per curiam decision in *United States* v. *Vaglica,* 490 F.2d 799, (5th Cir. 1974), which, following the decision in *Pacheco,* reversed three district court decisions among which was *Figueredo, supra.*

As can be seen from the foregoing the modern revival of Wharton's Rule in § 1955 cases has been viewed with something less than unanimous judicial enthusiasm. In spite of this court's admonition that it will "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecu-

tions.", *Grunewald* v. *United States,* 353 U.S. 391, 404 (1957), four circuit courts and numerous district courts have taken some pains to make two crimes out of one. While this court's teaching in *Callanan* v. *United States,* 364 U.S. 587, 593 (1961) emphasizes that conspiracy is a separate offense from the substantive offense and that the gravamen of conspiracy is an increased danger to society, that element of increased danger would appear to be lacking here.

Congress considered concerted illegal gambling activity by five or more persons a danger to society. The very nature of §1955 requires a conspiracy of a minimum of five; can it be reasonably argued that there is any greater danger to society from a gambling business operated by six or eight? The legislative history of the act clearly discloses that the act is designed to deal "only with illegal gambling activities of major proportions." H.R. Rep. No. 91-1549, U.S. Code Cong. & Admin. News 1970, p 4007. Congress did not provide for penalties in proportion to the size of the operation and thus it would seem to be repugnant to the legislative intent to interpret the statute in such fashion as to permit double punishment for the same offense. 59 Iowa L. Rev. 452, at 466 (1973).

III. The Practical Problem

The dilemma presented by these dual count indictments is both practical and procedural. From the practical point of punishment, the defendant's sentence and fines may be greatly increased. In the instant case seven of the eight defendants received an additional two years of probation. However in *Grosso* v. *United States,* No. 73-1412, petition for certiorari pending, one defendant was given the maximum sentence on

each count to be served consecutively and was fined $10,000 on the conspiracy count and $15,000 on the substantive count and another defendant was given consecutive terms of three years on Count I and five years on Count II and fined $25,000. (Pet. App. 20-22). Thus it can be seen that the problem in terms of punishment is a real one indeed.

As indicated previously § 1955 provides for punishment of all the participants in the proscribed activity. That this punishment should include the punishment for the illegal agreement necessarily included in that activity would appear to be plain common sense. This interpretation would seem to be additionally supported by the application of the "Rule of Lenity," *Bell* v. *United States,* 349 U.S. 81 (1955):

> "This policy of lenity means that the court will not interpret a federal crimnal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."
>
> *Ladner* v. *United States,* 358 U.S. 169, 178 (1958)

It is clear that Congress intended that each participant in an illegal gambling enterprise invoving five or more persons be liable for punishment. Since a conspiracy of five or more is required for the substantive offense, it would seem equally clear that, in the absence of specific legislative intent, the punishment devised by Congress should not be increased by the courts.

The spectre of double punishment is not the only problem with which defendants in this type of dual prosecution are faced. The addition of a conspiracy count places the defendant at a distinct procedural

disadvantage and gives the prosecutor considerable more latitude than he would normally have. This disadvantage has been the subject of discussion by legal commentators and jurists and has been described by one as follows:

> "By means of evidence inadmissable under usual rules the prosecutor can implicate the defendant not only in the conspiracy itself but also in the substantive crimes of his alleged co-conspirators. In a large conspiracy trial the effect produced upon the jury by the introduction of evidence against some defendants may result in conviction for all of them, so that the fate of each may depend not on the merits of his own case but rather on his success in disassociating himself from his co-defendants in the minds of the jury."
>
> *Developments In The Law—Criminal Conspiracy,* 72 Harv. L. Rev. 920, 923 (1959)

See also: *United States* v. *Falcone,* 109 F.2d 579, 581 (2d Cir.), *aff'd.* 311 U.S. 205 (1940); Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants,* 62 Harv. L. Rev. 276, 277 (1948).

The dangers inherent to a defendant in a conspiracy trial are considerably multiplied in cases such as the instant one where the bulk of the evidence is introduced by means of electronic interceptions of telephone communications. Because of the latitude permitted in conspiracy trials conspiracy has been called "the darling of the prosecutor". At the present time a conspiracy charge coupled with evidence produced by electronic surveillance might be more adequately described as the "prosecutor's dream".

In this case the conspiracy count named fourteen conspirators and named eleven unindicted co-conspirators. (15a) Count II of the indictment charged the same fourteen indicted conspirators with a substantive violation of § 1955. The bulk of the evidence introduced by the government consisted of tape recordings of phone calls between conspirators and unindicted co-conspirators and calls between the various named conspirators. This evidence was buttressed by the live testimony of two unindicted co-conspirators who had been granted immunity (William McCullough R. 62 to 100; Joanne Haney R. 1526 to 1594). To put it mildly, this evidence was somewhat incriminating.

At the outset of the case the District Court Judge gave the jury a preliminary charge; this charge began with a discussion and brief explanation of the conspiracy count and continued on through the successive counts of the indictment. (23a-32a) In connection with his preliminary conspiracy charge the court said:

> "In determining whether a conspiracy existed, you should consider the actions and declarations of all of the alleged paticipants. However in determining whether a particular defendant was a member of the conspiracy, if any, you should consider only his actions or statements. He cannot be bound by the actions or declarations of other participants until it is established a conspiracy existed and he was one of its members. This, I think will become clear, too, so we go along." (25a-26a)

The trial went along for a month and whether the court's cautious note of optimism, that this concept would become clear at some later point was justified, is a matter of some doubt.

In the court's final charge to the jury, the trial judge reviewed the counts of the indictment in reverse order. Starting with count 6 and proceeding through count 1, he also suggested that the jury deliberate in the same fashion. Whether the court's suggestion in this regard was followed is, of course, not known. The following portion of the final charge places in clear focus the evidentiary procedural problem posed by this type of dual prosecution:

> "If you once determine, however, after reviewing the evidence that conspiracy exists, and that the defendants or the defendant whom you happen to be considering at the time were members of it, then as to those who you find were members of the conspiracy, you may consider the declarations of others who were also members as evidence to aid you in determining if there is guilt proved beyond a reasonable doubt.
>
> Remember, for this situation to apply, you must determine one, a conspiracy existed; two, that the particular defendant whose guilt you are considering was a member, and then you may consider the hearsay statements made during the course of the conspiracy in furtherance of the conspiracy by another member of the conspiracy.
>
> Now, this is why I start off with the other counts and work toward the first count. That evidence would not be admissable in proving guilt under the second count, but it could be admissable under the circumstances I just enumerated with you in proving the guilt of conspiracy." (61a)

Regardless of what order the jury considered the counts of the indictment they found each and every defendant guilty of conspiracy as well as guilty of a violation of the substantive count. It would appear,

therefore, that they considered the acts and declarations of each as incriminating all and therein lies the principal danger of the conspiracy count being engrafted onto the indictment for the substantive offense. In the absence of the conspiracy count, as clearly recognized by the trial court, the jury could only consider evidence disclosed by a telephone call between one unindicted co-conspirator and a defendant as evidence against that defendant alone. With the addition of the conspiracy concept the implication and conviction of everyone is made immeasurably simpler.

A dramatic example of the problem presented in this situation is found in *Grosso* v. *United States,* No. 73-1412, certiorari pending, where four persons were indicted for conspiracy to violate § 1955 and the substantive violation of the statute. In the trial of that case the government introduced, at the very outset of the trial, a judicial admission in the nature of a confession by the principal co-defendant, and, in spite of the seemingly patent *Bruton* problem involved, the evidence was received, over strenuous objection by counsel, under the convenient umbrella of the conspiracy theory. (No. 73-1412, Grosso R. 290-314).

In this case the admission of the testimony of co-conspirators was the subject of continuing objection and resulted in considerable colloquy as might be expected when numerous defendants are involved and a considerable number of counsel answer the call to battle in legitimate and concerned support for the individual interest of their clients. The technical objections raised by counsel in this type of case is not born out of the time-worn tradition of legal nit-picking but is prompted by the necessary practical view that

experience in conspiracy trials has taught experienced counsel that once a conspiracy count rears its ugly head in a trial, what any witness says in the trial may convict every defendant.

It is our contention that the application of Wharton's Rule at the very least bars a punishment for conspiracy to violate § 1955 coupled with a separate punishment for the substantive offense. If we are correct in that contention, the question then arise as to the justification for submitting the conspiracy charge to the jury at all.

The government will doubtlessly contend here, as they have in cases in the lower courts, that the addition of a conspiracy count is justified on the hypothetical basis that a conspiracy to violate § 1955 can exist and should be punishable even if the substantive offense had not been completed. The trial judge in this case attempted to hypothesize such a situation to the jury in his final charge. (60a) This type of conjecture is about as relevant as the ancient theological debates relating to the number of angels that could dance on the head of a pin. There has never been a federal prosecution for conspiracy to violate § 1955 which was not coupled with a prosecution for the violation of the substantive offense. The statute requires as a ***sine qua non*** to successful prosecution that a minimum of five or more persons engage in an illegal gambling enterprise which has actually operated for thirty days or more or has grossed more than $2,000 in a single day. This case as well as all others that have been prosecuted under the legislative aegis of § 1955 are real cases not hypothetical ones. For whatever fanciful hypothetical potential conspiracies the government may

envision in aid of argument, the petitioners here have been convicted and sentenced for two separate crimes which are legally and logically one.

If conspiracy to violate § 1955 is not a separate crime and separately punishable, there is no justification for submitting it to the jury. If the prosecution cannot properly attain additional punishment, it should clearly not be permitted to take advantage of the increased evidentiary latitude afforded by traditional conspiracy concepts reinforced by the court's charge to the jury. If, in point of law, the petitioners here were not legally liable for additional punishment for the illegal agreement of which they were found guilty in the substantive offense, they then have been convicted by a jury which has been instructed in so fundamentally faulty a manner as to require a new trial.

The trial judge attempted in his charge to suggest to the jury that they consider the substantive offense before they deliberated on the conspiracy count; this was a mere suggestion, not a direction. (41a) No matter what order the deliberation of the jury took in terms of the individual counts, they had been instructed that hearsay evidence by any witness could be evidence of guilt of all the petitioners as to conspiracy—a conspiracy of which they had to find petitioners guilty in the substantive offense. It is respectfully submitted that the charge of the court on this point cannot now be cured by the simple expediency of a reversal of the conspiracy conviction and the remission of the sentence that the court imposed as a result thereof, and, accordingly, a new trial should be granted.

CONCLUSION

Petitioners here, eight in number, have been convicted and sentenced for violation of conducting an illegal gambling enterprise in violation of 18 U.S.C. 1955. Petitioners here, the same eight individuals, have been convicted and have had additional sentences imposed upon them for conspiring to violate 18 U.S.C. 1955.

It is the contention of the petitioners that a proper statutory interpretation of 18 U.S.C. 1955 requires a finding by this court that petitioners should not have been convicted an dsentenced for the conspiracy to violate § 1955 and the substantive violation thereof. We bottom this contention on the precept of Wharton's Rule, which in the recent past has been not much in vogue, but, like most older teachings, is today still very viable. The substantive offense in this case requires the concerted action of a plurality of agents to make the crime complete and so does the conspiracy statute. The elements requisite to complete both offenses are identical and thus we contend that the offenses merge.

Since the offense charged in the conspiracy count and in the substantive count were one and the same, we respectfully contend that the petitioners are entitled to a new trial by reason of the fact that the court's final charge permitted the jury to consider the guilt of the defendants by evidentiary standards which were fundamentally erroneous and incurably prejudicial. At the very least we contend that petitioners are entitled to a reversal of their conspiracy convictions and vacation of the sentences imposed thereunder.

For all of the foregoing reasons, the judgment below should be reversed and a new trial granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

U. S. DISTRICT COURT, W. D. PA.

(June 26, 1972)

PROCEEDINGS

THE COURT: Good morning, gentlemen.

This is the time set for argument on motion for a new trial or acquittal and arrest of judgment.

Do any of the defendant's counsel wish to argue at this point?

(No reply).

THE COURT: Motions have been filed by all parties and no briefs have been filed by counsel, none having been requested by the Court.

I think it should be made clear on the record that the reason for this is the type of case this is and the type of reasons averred for the grant of a new trial.

During the trial of this case, there were extensive conferences between counsel and the Court. Counsel furnished the Court with various cases which their research had uncovered and most of the disputed points of law were thoroughly argued during the trial itself and therefore I think that it is in the interests of justice and speeding up the ultimate end of these cases that we not delay matters any further by going over the same points that were thoroughly argued during the trial itself.

Since the proceedings were under two important new Acts of Congress, that pertaining to wiretapping and that pertaining to large scale gambling under Section 1955, there was little in the way of precedent to guide either the Court or counsel. Therefore, choices had to be made and there has been nothing happen since the time of trial which would indicate that the choices should have been different than what they were.

For example, the defendants took exception to definitions of the words, "conduct, lay-off betting, business," as they pertained to the Section 1955 violation.

In addition, there was exception granted as to the lack of necessity of scienter being shown. The case of the *United States* vs. *Reale,* which, incidentally, was argued during the trial of Iannelli, has since been decided by the Court of Appeals for the Circuit and affirmed generally the charge given by Judge Weber on which I relied for much of my definitions in this case.

The exceptions taken to the testimony of Special Agent Boyd, who testified as an expert, while I feel his testimony was properly for the Jury and see no reason to change my ruling as to his testimony, there is one particular point, though, which is raised in the reasons for new trial assigned by Defendant Iannelli, and that is to the interrogation of Juror No. 4, which was done in camera. I am somewhat puzzled by this being assigned as a reason for a new trial, because the in camera discussion was at the suggestion of and with the approval of all defense counsel and it was to ease the minds of defense counsel to determine if this juror had discussed his possibly unfriendly attitude toward one of Mr. McLaughlin's partners as a result of a civil case in which Juror No. 4 had been represented by this particular lawyer.

The juror was excused because of the possibility that he might have some bias against Mr. McLaughlin or his firm. As it turned out during the in camera discussion, the juror had not even associated Mr. McLaughlin in his mind with his former lawyer and therefore, no harm was done.

However, because during the lengthy trial, he might later make such a connection, it was decided, with the consent of all counsel, this juror should be excused and an alternate should be seated. This matter was called to the attention of the Court by Mr. McLaughlin, and very properly so, I

might add, but it was for the benefit of his client that the juror was excused.

Therefore, I do not feel this is a valid reason for the granting of a new trial.

The other in camera meeting with counsel for the prosecution has been thoroughly explored with defense counsel and the record made for appellate review. At this time, I do not feel the course pursued was error or that any other feasible alternative was open to the Court at that time.

Again, the pretrial publicity, I think, was adequately discussed before the Jury was selected. The voir dire proceedings disclosed no prejudice to the defendants and I do not consider that any valid reason for new trial.

The exceptions taken by the Defendant Scolieri to the definition of "gross revenue," and "aiding and abetting," in the charge, again I feel fall in the same category as the other definitions I referred and ultimately will be resolved by an Appellate Court.

The use of the voice identification is a question which has some authority for the action taken by the Court. I referred counsel to proposed rules of evidence for the Federal Courts No. 9-01, which seems to codify existing law and I also call counsel's attention to the *United States vs. Alper,* decided by the Court of Appeals of this Circuit during the past few months, of which I believe we had some discussion during the trial.

I would also call counsel's attention to the collection of cases 31-A Corpus Juris Secundum, Section 188. Similarly, the evidence relating to the Northeast Recorder, I think, is properly admitted and a matter for the Jury to decide.

The question of duplicity again was raised. This is at it pertained to the conspiracy count and Section 1955 count. Again, this was thoroughly considered by the Court and ably argued by counsel.

I do not agree with the opinion on the Greenberg case on which counsel relied, and concluded after my own research on the matter in other cases, since there were different elements involved in each count, different numbers of persons could be involved in each count, and for this reason, the doctrine cited in the Greenberg case was not applicable.

Again, the obtaining of voice exemplars, which is alleged to have been done and unconstitutional matter, I find not to be such as to justify any reversal and I find the procedure was not unconstitutional.

Similarly, the refusal to suppress physical evidence taken from the homes of several defendants, I do not believe constituted error. The *Blank* case relied on by the defendants handed down by the Northern District of Ohio, has since been reversed by the Court of Appeals for that Circuit. This leaves a seeming conflict between circuits, between the one that decided the *Philpott* case and the one that reversed the *Blank* case.

I think the record should also indicate that the most current of the Criminal Law Reporter in the case *United States vs. Harris,* decided by the Court of Appeals for the Fifth Circuit, on May 22, 1972—that is found at 11 Criminal Law Reporter, 2246—that Court found that Section 1955 was constitutional.

To my knowledge, this is the only Appellate Court which has yet considered the matter.

I have considered all the other motions raised by the defendants in the motions for new trial, and for other post-trial relief and find them wanting.

The record should indicate, however, the denial of these motions from the bench without oral argument should not be taken as indicating lack of consideration by the Court of the points raised. It is simply that these matters were

thoroughly argued and considered during the course of the trial and that it would not serve any further purpose by arguing at this time.

I think, similarly, little would be served except delay by the preparation of a lengthy opinion which would restate, really, what was given to the record during the trial and which is included in the opinions filed on the preliminary matters in this case.

All motions of the defendants therefore are denied.

We will now proceed to sentencing.

(The defendants were sentenced.)

I Hereby Certify that the foregoing is a true and correct transcript of the proceedings had in the captioned matter.

Supreme Court, U. S.
FILED
NOV 16 1974
MICHAEL RODAK, JR., CLERK

No. 73-64

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT E. IANNELLI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-64

ROBERT E. IANNELLI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-27a) is reported at 477 F. 2d 999. The opinion of the district court (Pet. App. 1a-21a) is reported at 339 F. Supp. 171.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1973. A petition for rehearing was denied on June 6, 1973 (Pet. App. 29a). The petition for a writ of certiorari was filed on July 5, 1973, and was granted on May 28, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Wharton's Rule makes it improper to indict, convict, or sentence a person both for conducting an illegal gambling business involving five or more persons in violation of 18 U.S.C. 1955 and for conspiring to commit that offense in violation of 18 U.S.C. 371.

STATUTES INVOLVED

1. 18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *

2. 18 U.S.C. 1955 provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> (2) "gambling" includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. * * *

STATEMENT

A six-count indictment (A. 14–23) was filed in the United States District Court for the Western District of Pennsylvania charging petitioners with a variety of federal gambling offenses. Count 2 charged that all eight petitioners and six co-defendants "did knowingly and wilfully conduct, finance, manage, supervise, direct, and own an illegal gambling business," in violation of 18 U.S.C. 1955 (A. 21). Count 3 charged that petitioner Iannelli and a co-defendant used Western Union tickertape facilities in interstate commerce with intent to promote an illegal gambling business, in violation of 18 U.S.C. 1952 (A. 21–22). Counts 4 and 5 charged petitioner Iannelli with mailing gambling paraphernalia, in violation of 18 U.S.C. 1302 (A. 22), and count 6 charged him with using a fictitious name for the purpose of conducting, by means of the Postal Service, unlawful bookmaking activities, in violation of 18 U.S.C. 1342 (A. 23).

Count 1 charged that all eight petitioners, together with six co-defendants and eleven unindicted co-conspirators, conspired to commit violations of 18 U.S.C. 1302, 1952, and 1955 (A. 14–20).

After a jury trial, all eight petitioners were convicted of conducting an illegal gambling business

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(count 2) and of conspiring to commit that offense (count 1).[1] Petitioner Iannelli was also convicted of mailing gambling paraphernalia (count 4) and using a fictitious name (count 6).[2]

On the substantive counts, petitioners were fined and sentenced both to imprisonment and to subsequent periods of probation; on the conspiracy count, they were sentenced to periods of probation to run concurrently with, and (except for petitioner Iannelli) longer than, the periods of probation imposed on the substantive count (A. 9–11).[3]

[1] Although count 1 also charged petitioners with conspiring to violate 18 U.S.C. 1302 and 1952, the district court ruled that the government's evidence was insufficient to show a conspiracy to commit those offenses (Tr. 2409). The court accordingly instructed the jury with respect to count 1 only on the charge of conspiring to violate Section 1955 (A. 55–62).

"Tr." refers to the transcript of the trial proceedings, which is part of the record in this case.

[2] The district court granted motions for judgment of acquittal on counts 1 and 2 as to four of the co-defendants (A. 6–7; Tr. 2299, 2313, 2323, 2360, 2409). It also granted petitioner Iannelli's motion for judgment of acquittal on counts 3 and 5 (A. 7; Tr. 2250, 2257). A fifth co-defendant died prior to trial. The jury was unable to reach a verdict with respect to another co-defendant, Dolores Iannelli. She was later retried and convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. See *United States* v. *Dolores Iannelli*, 480 F. 2d 919 (C.A. 3), certiorari denied, No. 73–103, May 28, 1974.

[3] On the substantive count, petitioners Diulus, Orlansky, and Scolieri were each fined $15,000 and one-eighth of the cost of the prosecution, and each was sentenced to a term of two years' imprisonment (subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2)), to be followed by a period of three years' probation. Petitioners Cammaratta, Cancilla, Fusaro, and Gobos were each fined $10,000 and one-eighth of the cost of prosecution, and each was sentenced to a term of 18 months' imprisonment; the prison term was suspended for each,

The prosecution's evidence, much of which was based on information derived from a court-ordered wire interception, showed that between October 16, 1970, and March 25, 1971, petitioners conspired to conduct and did conduct a substantial bookmaking operation, accepting bets and wagers on races, sporting events, and numbers. On two weekends during the period covered by the conspiracy, the operation accepted nearly $250,000 in wagers (Tr. 1831–1834). These activities were in violation of Pennsylvania law.[4] Petitioners neither testified nor presented any other evidence.

In one of many pre-trial motions, petitioners sought dismissal of the conspiracy count of the indictment on

however, on the condition that he remain confined in a jail-type institution for three months (six months for Fusaro); in addition, each was placed on probation for three years to commence upon completion of the prison term.

Petitioner Iannelli was fined a total of $22,000 plus one-eighth of the cost of prosecution; he was sentenced to a term of three years' imprisonment on count 2 (subject to 18 U.S.C. 4208(a)(2)), to be followed by a period of five years' probation; he was also sentenced to a concurrent term of two years' imprisonment on count 4, and to a period of five years' probation on count 6, to run concurrently with the period of probation on count 2.

In addition, each petitioner was sentenced to a period of five years' probation on the conspiracy count, to commence after imprisonment on the substantive counts and to run concurrently with the periods of probation on those counts.

[4] The conducting of lotteries and the engaging in pool-selling and bookmaking were, at the time of the conspiracy, proscribed by Pennsylvania's Penal Code of 1939 (18 Purdon's Pa. Stat. 4601 and 4607, set forth in appendix to present Title 18, Pa. Consol. Stat.). Under revisions of that Code, effective June 6, 1973, the substance of those provisions is now contained in 18 Pa. Consol. Stat. 5512 and 5513.

the ground that it was duplicative of the count charging a substantive violation of 18 U.S.C. 1955. They invoked "Wharton's Rule" as an exception to the general principle that "the commission of a substantive offense and a conspiracy to commit such offense are separate and distinct" (Pet. App. 19a). Wharton's Rule provides that, "where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy" (*Gebardi* v. *United States*, 287 U.S. 112, 122).

The district court denied the motions without prejudice to their renewal during trial (Pet. App. 19a–20a). It reasoned that count 1 charged a conspiracy to violate not only Section 1955 but also Section 1952. Moreover, the court stated, Wharton's Rule would apply only if the underlying substantive offense were actually consummated. "[I]t would serve little purpose, therefore, to dismiss only part of the count at this stage of the proceeding when we are not certain what facts might be proved at trial with respect to § 1955" (*id.* at 19a).

At trial, the district court submitted to the jury both the count charging a substantive violation of Section 1955 and—as limited by the court's instructions (see note 1, *supra*)—the count charging a conspiracy to commit that offense. After the jury returned verdicts of guilty as to both counts, the district court denied motions for a new trial and for judgments of acquittal notwithstanding the verdicts

(Supp. App. 1a–5a).[5] The court stated from the bench that Wharton's Rule was not applicable because "there were different elements involved in each count" and "different numbers of persons could be involved in each count" (*id.* at 4a).

The court of appeals affirmed (Pet. App. 23a–27a). It held, relying on *United States* v. *Becker*, 461 F. 2d 230 (C.A. 2), vacated and remanded on other grounds, May 28, 1974, No. 72–158, that Wharton's Rule does not apply, because the conspiracy charged in this indictment involved more than the minimum number of persons (five) whose participation in the operation of a gambling business is required for the commission of the substantive offense under Section 1955 (*id.* at 24a).

Because of the existence of a conflict among the courts of appeals on the Wharton's Rule issue, we acquiesced in the granting of the petition for a writ of certiorari with respect to that issue.[6] The petition also raised an issue—subsequently decided adversely to petitioners in *United States* v. *Chavez*, No. 72–1319, decided May 13, 1974—concerning the Justice Department's procedures for authorizing and applying for court orders permitting wire interceptions. After the decision in *Chavez*, this Court granted certiorari in the present case solely on the Wharton's Rule issue.

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[5] "Supp. App." refers to the supplemental appendix to petitioners' brief.

[6] In addition to the Third Circuit in the present case and the Second Circuit in *Becker*, *supra*, the Fourth and Fifth Circuits have held that Wharton's Rule is no bar to the indictment, conviction, and punishment of a person for both the substantive offense under Section 1955 and the conspiracy to commit it. *United States* v. *Bobo*, 477 F. 2d 974 (C.A. 4), pending on

SUMMARY OF ARGUMENT

In the first part of this brief, we discuss the nature of Wharton's Rule, seek to identify the circumstances (rare, in our view) in which it has proper application, and demonstrate that it is not applicable in the instant case. This discussion proceeds on the premise that Wharton's Rule, where applicable, properly extends only to the preclusion of cumulative penalties for the conspiracy and the substantive offense.

In the second part of the brief we show that there is no basis in either logic or policy for the use of Wharton's Rule, assuming it is applicable, at any stage of the proceeding prior to sentencing. Specifically, Wharton's Rule, properly understood, cannot be utilized to bar indictment or submission to the jury of a conspiracy charge, but only double punishment.

I

A. A substantive criminal offense and a conspiracy to commit it ordinarily are separate and distinct crimes for which one may be separately indicted, convicted, and punished. A conspiracy is thought to pose "a greater potential threat to the public than individ-

petition for a writ of certiorari *sub nom. Gray* v. *United States*, No. 73-231; *United States* v. *Pacheco*, 489 F. 2d 554 (C.A. 5), pending on petition for a writ of certiorari, No. 73-1510; *United States* v. *Vaglica*, 490 F. 2d 799 (C.A. 5), pending on petition for a writ of certiorari *sub nom. Scaglione* v. *United States*, No. 73-1503.

The Seventh Circuit stands alone among the courts of appeals in holding that Wharton's Rule applies in the context of Section 1955. *United States* v. *Hunter*, 478 F. 2d 1019, certiorari denied, 414 U.S. 857; *United States* v. *Manson*, 494 F. 2d 804.

ual delicts," because "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed" (*Callanan* v. *United States*, 364 U.S. 587, 593-594). Unlike an attempt, therefore, a conspiracy does not merge into the completed offense; it may be punished separately regardless of whether its substantive aim was consummated.

Wharton's Rule is a narrow exception to these principles. It precludes multiple punishment for a conspiracy and its consummated criminal objective only in the rare situation in which a substantive offense necessarily includes a conspiracy, so that it would be "impossible under any circumstances" to commit the substantive crime without conspiring to do so (*Gebardi* v. *United States*, 287 U.S. 112, 122). For example, the crime of dueling—which is a combat with deadly weapons engaged in by two persons pursuant to an agreement to do so—embraces the elements of a conspiracy (an agreement to pursue an unlawful objective and an overt act) and therefore could not be committed in the absence of a conspiracy. Cumulative punishment for the two offenses would be barred by Wharton's Rule, which, properly understood, is simply a specific application to conspiracy prosecutions of the more general rule, rooted in the Fifth Amendment's protection against double jeopardy, that forbids cumulative punishment for any two offenses arising out of the same conduct, where one offense is necessarily included within the other. In such circumstances, it is presumed that Congress intended the

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punishment for the greater offense to include punishment for any necessarily included offense.

B. Wharton's Rule does not apply in the context of 18 U.S.C. 1955, because it is possible to commit the offense defined by that section without conspiring to do so. Although the statute requires proof that the illegal gambling business "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business," it does not require proof that each person involved in the business "shared in the guilty knowledge and design" (*Morrison* v. *California*, 291 U.S. 82, 93). One bookmaker could conduct an illegal gambling business involving five or more persons who, while performing functions necessary to the operation of the business, such as telephone answering, are unaware that the business involves illegal gambling. Their participation could satisfy the requirement that five or more persons "conduct * * * part of such business," even though none would have guilty knowledge or criminal intent. The statute makes it possible to prosecute a lone violator who operates a large enough business to warrant federal concern, but whose employees are unaware of the nature of the business they are conducting.

In those circumstances, the bookmaker would be guilty of the substantive crime but not of a conspiracy, because a conspiracy presupposes "a corrupt agreement between not less than two with guilty knowledge on the part of each" (*Morrison* v. *California*, *supra*, 291 U.S. at 92). It follows that a conspiracy requires proof of a fact—the existence of a corrupt agreement—not essential for conviction of the substantive gambling offense and consequently is not included within that offense. There is no reason, therefore, to presume that the punishment prescribed for the substantive gambling offense was intended by Congress to include punishment for a conspiracy to commit it.[7]

C. Even if Wharton's Rule might otherwise apply in the context of Section 1955, the facts of the present case bring into play the rule's traditional exception, which permits separate punishment for a conspiracy if "it contemplated the cooperation of a greater number of parties than were necessary to the commission of the principal offense" (*Gebardi* v. *United States*, *supra*, 287 U.S. at 122, n. 6). When the criminal combination includes more persons than the minimum number logically required for the commission of the substantive crime, its dangers exceed those that are inherent in the substantive offense itself. The presence of additional minds is thus an aggravating factor warranting punishment in addition to that prescribed for the substantive crime, for much the same reason that a conspiracy of two persons is separately punishable when the substantive crime can be committed by one.

The indictment here alleged a conspiracy involving

[7] We do not deny that it would be a rare case in which a violation of Section 1955 is charged where there are not at least two persons knowingly involved in the gambling operation and thus liable to conviction on the substantive charge. However, we believe that the correct analysis of the application of Wharton's Rule turns on the logical structure of the substantive offense rather than any pragmatic assessment of probabilities that it will in fact be committed by more than one person.

25 persons, and the jury found eight of them guilty of that charge. Thus, even if Wharton's Rule might otherwise be applicable, this case falls within the exception.

D. This Court's "rule of lenity" does not aid petitioners. We do not dispute the proposition that, where a statute and its legislative history are ambiguous concerning the appropriate unit of prosecution, the "doubt will be resolved against turning a single transaction into multiple offenses" (*Bell* v. *United States*, 349 U.S. 81, 84). This Court has accordingly held, for example, that transporting more than one woman in the same vehicle for immoral purposes is a single violation of the Mann Act (*Bell* v. *United States*, *supra*) and that the wounding of two federal officers by a single discharge of a gun constitutes only one offense (*Ladner* v. *United States*, 358 U.S. 169).

The issue here, however, is not whether conspiracy is an appropriate unit of prosecution, but whether Congress should be presumed to have intended only a single punishment for convictions of conducting an illegal gambling business and of conspiracy to do so. Where there is doubt concerning the intention of Congress with respect to the punishment of a substantive offense and a conspiracy to commit it, the rule of lenity gives way to a contrary presumption based upon the historic distinctiveness of the two crimes. This Court attributes to Congress a tacit purpose to maintain the distinction between the two offenses and the separate punitive consequences of each. "To dislodge such conventional consequences in the outlawing of two disparate offenses, conspiracy and substantive conduct, and effectuate a reversal of the settled interpretation * * * would require specific language to the contrary" (*Callanan* v. *United States*, *supra*, 364 U.S. at 595).

II

Even if Wharton's Rule were applicable and this case were not within the exception to the rule, there would be no need to require a new trial. Although some courts have echoed Wharton's statement that a conspiracy to commit a substantive offense that requires cooperative action is not itself an indictable offense, that view is inconsistent with the true rationale of Wharton's Rule and appears to rest on Wharton's misreading of the first case in which the principle underlying his rule was applied (*Shannon* v. *Commonwealth*, 14 Pa. 226).

When a substantive offense necessarily includes a conspiracy, Wharton's Rule properly requires only that an indictment charging a conspiracy to commit that offense should be treated in the same manner as an indictment charging any other offense that is included within some greater crime. That the legislature has also defined a greater crime does not mean that a person may not be indicted for a separate crime included within it. It means only that a defendant may not be punished cumulatively for conduct that violates both provisions.

Thus, even if a defendant could not properly be given cumulative sentences for violating Section 1955 and for conspiring to do so, both charges could be submitted to the jury if there were a factual dispute over some element of the gambling offense that is not

an element of a conspiracy, such as whether a sufficient number of persons were involved in the conduct of the business. If the jury resolves the issue in the defendant's favor, it should be free to consider whether the evidence nevertheless establishes each element of the included conspiracy. The proper procedure, therefore, is to instruct the jury to consider the conspiracy charge if but only if it first determines that the defendant is not guilty of the substantive crime.

Although the district court did not follow this procedure because of its view, which we share, that Wharton's Rule is inapplicable, the appropriate disposition of this case, if this Court disagrees with that view, is to vacate petitioners' convictions on the conspiracy count, for which seven of them were given terms of probation that would exceed their probation terms on the substantive count.

Petitioners claim that a new trial is required because the district court permitted the jury to consider with respect to the substantive count hearsay evidence that would be inadmissible in the absence of the conspiracy charge. But the district court in fact instructed the jury here that it could consider the hearsay evidence only with respect to the conspiracy and not with respect to the substantive count. In any event, the co-conspirator exception to the hearsay rule is applicable upon independent proof of a joint criminal venture without regard to whether a conspiracy has been formally charged in the indictment, particularly where, as in this case, the charged substantive offense is deemed to include a conspiracy. Thus,

the same evidence would be admissible if there were to be a retrial on the Section 1955 count alone.

ARGUMENT

I

A PERSON MAY PROPERLY BE INDICTED, CONVICTED, AND PUNISHED BOTH FOR CONDUCTING AN ILLEGAL GAMBLING BUSINESS INVOLVING FIVE OR MORE PERSONS IN VIOLATION OF 18 U.S.C. 1955 AND FOR CONSPIRING TO COMMIT THAT OFFENSE IN VIOLATION OF 18 U.S.C. 371

A. WHARTON'S RULE IS A NARROW EXCEPTION TO THE USUAL PRINCIPLE THAT A SUBSTANTIVE OFFENSE AND A CONSPIRACY TO COMMIT IT ARE SEPARATE AND DISTINCT CRIMES FOR WHICH ONE MAY BE SEPARATELY INDICTED, CONVICTED, AND PUNISHED; IT PRECLUDES SEPARATE PUNISHMENT ONLY WHERE IT IS LOGICALLY IMPOSSIBLE UNDER ANY CIRCUMSTANCES TO COMMIT THE SUBSTANTIVE CRIME WITHOUT ALSO COMMITTING THE CONSPIRACY

1. Wharton's Rule owes its name to Francis Wharton, whose treatise on criminal law contains the classic statement of the rule and its rationale:

> When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. * * * In other words, when the law says, "a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name," it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—*e.g.*, adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspir-

acy. * * * [2 Wharton, *Criminal Law* § 1604, p. 1862 (12th ed. 1932).][8]

Though it has never applied Wharton's Rule, this Court has alluded to it on several occasions. For example, in *Gebardi* v. *United States, supra,* 287 U.S. at 121–122, the Court referred to "those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy." See also *United States* v. *Holte,* 236 U.S. 140, 145; *United States* v. *Katz,* 271 U.S. 354, 355; *Pinkerton* v. *United States,* 328 U.S. 640, 643.[9]

2. With respect to the circumstances in which Wharton's Rule applies, we are on common ground with petitioners: the rule applies only "where it is impossible under any circumstances to commit the substantive offense without cooperative action" (*Gebardi* v. *United States, supra,* 287 U.S. at 122). From this common premise, however, the parties reach opposite conclusions about whether the rule should be applied to cases in which the substantive offense is a violation

[8] The current edition of Wharton's treatise states the rule this way: "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." 1 Anderson, *Wharton's Criminal Law and Procedure* § 89, p. 191 (1957).

[9] Wharton's Rule is not applied in the English courts, and the leading British commentator has stated that "the doctrine seems unnecessarily subtle." Williams, *Criminal Law,* § 164, p. 533, n. 3 (1953 ed.).

of 18 U.S.C. 1955 and, if it should, whether a new trial is required in this case. For that reason, and because the courts have not always applied Wharton's Rule with the precision that we think is required by its limited rationale, it is important to identify the source of the rule and its relationship to "the theory upon which conspiracies are punished" (*ibid.*).

Under 18 U.S.C. 371, it is a crime for two or more persons to "conspire * * * to commit any offense against the United States" if "one or more of such persons do any act to effect the object of the conspiracy * * *." "The gist of the crime * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts" (*Braverman* v. *United States,* 317 U.S. 49, 53), and it is this "collective planning of criminal conduct at which the statute aims" (*Gebardi* v. *United States, supra,* 287 U.S. at 121).

The legislative determination to proscribe "the combination of minds for [an] unlawful purpose" (*Pettibone* v. *United States,* 148 U.S. 197, 202), as distinct from the consummated crime, is bottomed on the judgment that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts" (*Callanan* v. *United States,* 364 U.S. 587, 593). "It has ingredients, as well as implications, distinct from the completion of the unlawful project" (*Pinkerton* v. *United States, supra,* 328 U.S. at 644).

What special dangers are posed by a conspiracy? "Concerted action both increases the likelihood that the criminal object will be successfully attained and

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decreases the probability that the individuals involved will depart from their path of criminality" (*Callanan* v. *United States, supra,* 364 U.S. at 593). It also often "makes possible the attainment of ends more complex than those which one criminal could accomplish" (*ibid.*). The danger is not limited, however, to the specific criminal object of the conspiracy. "Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed" (*id.* at 593–594), because it "involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices" (*United States* v. *Rabinowich,* 238 U.S. 78, 88).

For these reasons, "[i]t has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses" (*Pinkerton* v. *United States, supra,* 328 U.S. at 643), to which the legislature may "affix distinct and independent penalties" (*Clune* v. *United States,* 159 U.S. 590, 595). See also *Callanan* v. *United States, supra,* 364 U.S. at 593 ("The distinctiveness between a substantive offense and a conspiracy to commit [it] is a postulate of our law"); *Pereira* v. *United States,* 347 U.S. 1, 11; *United States* v. *Rabinowich, supra,* 238 U.S. at 86. In view of the historic differentiation of a conspiracy from its criminal object—"a distinction whose practical importance in the criminal law is not easily overestimated"—this Court "attribute[s] to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain" conspiracy as a crime separate from the substantive offense. *United States* v. *Rabinowich, supra,* 238 U.S. at 88.

The distinctiveness of the two offenses has several important practical consequences. First, a conviction for conspiracy may carry a heavier penalty than the substantive offense at which the conspiracy is aimed. *Clune* v. *United States, supra.*[10] Second, the conspiracy is a completed offense once the parties agree to pursue an unlawful end and one of them commits an overt act in furtherance of that end (see *Gebardi* v. *United States, supra,* 287 U.S. at 121); unlike an attempt, it does not merge into the completed substantive offense (*Pinkerton* v. *United States, supra,* 328 U.S. at 643).

The conspirators may therefore be indicted and punished separately for the conspiracy when the substantive offense has not been consummated (*United States* v. *Rabinowich, supra,* 238 U.S. at 86; *Callanan* v. *United States, supra,* 364 U.S. at 590) as well as when it has been consummated (*Pinkerton* v. *United States, supra,* 328 U.S. at 643; *United States* v. *Rabinowich, supra,* 238 U.S. at 86).

Because the crimes are distinctive, however, one cannot be convicted of a conspiracy if the indictment charges only the substantive offense. "[T]he combina-

[10] In *Clune,* the defendant had been sentenced to 18 months' imprisonment for conspiring to obstruct the passage of United States mails. The maximum punishment for commission of the substantive offense would have been a fine of $100. The Court stated: "Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body" (159 U.S. at 595).

tion of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment" (*Pettibone* v. *United States, supra,* 148 U.S. at 202). And, since each offense requires proof of different elements, one may be prosecuted and convicted of both under either a single indictment or successive indictments. "[A] plea of double jeopardy is no defense to a conviction for both" (*Pereira* v. *United States, supra,* 347 U.S. at 11)."

3. Wharton's Rule is a narrow exception to these principles. It is rooted, we believe, in the Fifth Amendment's protection against double jeopardy and, properly viewed, is merely a specific application to conspiracy prosecutions of the more general rule that only a single punishment may be imposed upon convictions for two offenses where the two are identical or where one is necessarily included within the other.

As with any other two crimes, a substantive offense and the conspiracy to commit it are separate and distinct only if "each * * * requires proof of an additional fact which the other does not" (*Blockburger* v. *United States,* 284 U.S. 299, 304). If neither requires proof of a fact that the other does not, then the offenses are identical. In that event—since the double jeopardy clause protects not only against a second prosecution after conviction or acquittal of the same

[11] In some circumstances, however, where the jury's verdict of acquittal in a trial for one of the offenses amounts to a determination favorable to the defendant of the facts essential to conviction of the other offense, "*res judicata* may be a defense in a second prosecution" (*Sealfon* v. *United States,* 332 U.S. 575, 578). See also *Ashe* v. *Swenson,* 397 U.S. 436.

offense but also against multiple punishments for the same offense (*North Carolina* v. *Pearce,* 395 U.S. 711, 717)—a person may not be punished cumulatively for a single act or transaction that violates both provisions. See *Pereira* v. *United States, supra,* 347 U.S. at 11; *Pinkerton* v. *United States, supra,* 328 U.S. at 644.

If only one offense requires proof of an additional element not essential for conviction of the other—so that it would be impossible under any circumstances to commit the former without also committing the latter—then the latter is necessarily included within the former. As with identical offenses, cumulative punishment of the greater offense and the necessarily included offense is foreclosed. See *Fuller* v. *United States,* 407 F. 2d 1199, 1233, n. 52 (C.A. D.C. *en banc*), certiorari denied, 393 U.S. 1120; *Ekberg* v. *United States,* 167 F. 2d 380, 385 (C.A. 1)."

This aspect of the double jeopardy protection is, of course, subject to the legislative will. Since the severity and allocation of punishment for criminal conduct "are peculiarly questions of legislative policy"

[12] Moreover, conviction or acquittal of either ordinarily bars subsequent prosecution for the other. See *In re Nielsen,* 131 U.S. 176, 187–190 (conviction of greater offense bars later prosecution for included offense); *Waller* v. *Florida,* 397 U.S. 387 (conviction of lesser bars later prosecution for greater); *Grafton* v. *United States,* 206 U.S. 333, 349–352 (acquittal of lesser bars later prosecution for greater, and (in dictum) acquittal of greater bars later prosecution for lesser). There may be exceptions, however. In *Diaz* v. *United States,* 223 U.S. 442, for example, the Court held that the double jeopardy clause of the Philippine Act would not bar a prosecution for homicide after a prior conviction of assault, where the victim died after the assault trial had ended.

(*Gore* v. *United States*, 357 U.S. 386, 393), Congress *could* properly determine that separate punishment may be imposed for commission of both the greater offense and the one necessarily included within it (cf. *id.* at 392–393). In the absence of a contrary indication of legislative purpose, however, it is reasonable to presume that Congress, in fixing the punishment for the greater offense, took into account all the conduct necessarily involved in the commission of that offense, including any portion of the conduct that would otherwise be punishable under some other provision.

These principles do not ordinarily apply to conspiracy cases. Since one may usually be convicted of conspiracy without proof that the substantive offense was consummated, and since few substantive crimes require proof of an agreement between two or more persons to pursue an unlawful object, each offense usually "requires proof of an additional fact which the other does not" (*Blockburger* v. *United States, supra,* 284 U.S. at 304), and each is therefore subject to separate punishment. Where two offenses have different elements, there is no reason to presume that the punishment prescribed by Congress for either one takes account of the conduct required for commission of the other.

In rare instances, however, a substantive crime may require proof of an agreement or conspiracy to commit it. The crime of dueling, for example, is commonly defined as "a combat with deadly weapons engaged in by two persons pursuant to an agreement to do so" (2 Anderson, *Wharton's Criminal Law and Procedure,* § 848, p. 719 (1957)). See *Ward* v. *Commonwealth,* 132 Ky. 636, 116 S.W. 786, 787; *State* v. *Fritz,* 133 N.C. 725, 45 S.E. 957. The elements of a conspiracy—agreement to pursue an unlawful objective and an overt act—are necessarily included within the definition of the substantive crime, and it would therefore be impossible to engage in a duel without also conspiring to do so. In the absence of a contrary indication of legislative intent, therefore, cumulative punishment for the dueling and for the conspiracy would be impermissible.[13]

The same would be true with respect to the other classic Wharton's Rule offenses—adultery, incest, and bigamy—but only in those jurisdictions where the mutual consent of both parties is an essential element of the offenses and where ignorance of the partner's marital status or consanguinity is not a defense. Compare *Shannon* v. *Commonwealth,* 14 Pa. 226 (consent apparently an element of adultery), with *State* v. *Clemenson,* 123 Iowa 524, 99 N.W. 139 (consent not an element of adultery). Since it would be impossible, in those jurisdictions, to commit the substantive offense without agreeing to do so, the substantive crime would necessarily include a conspiracy, and multiple punishment for the two offenses would be foreclosed.[14]

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[13] But, as explained in Part II, *infra*, indictment and trial on both charges would *not* be precluded.

[14] Where consent is not an element of the offense, however, it would be possible to commit it without an agreement to do so. A married man, for example, could commit adultery by raping a woman not his wife. The offense therefore would not necessarily include a conspiracy, and separate punishment for the two offenses would not violate double jeopardy protections. Similarly, if ignorance of the partner's marital status were a defense to a charge of adultery, the aware partner would alone

Whatever else Mr. Wharton may have understood his rule to mean, this, we submit, is its correct application consistent with "the theory upon which conspiracies are punished" (*Gebardi* v. *United States*, *supra*, 287 U.S. at 122). Since the substantive crime includes a conspiracy, it cannot be aggravated by a conspiracy. A conspiracy between two persons to engage in a duel or to commit adultery would pose no threat to society that would not be posed by commission of the offense itself.

Where the substantive crime can logically be committed without a conspiracy, however, a "collective criminal agreement" (*Callanan* v. *United States*, *supra*, 364 U.S. at 593) would be an aggravating factor enhancing the danger to the community, and Wharton's Rule would not apply. Thus, the crimes of giving or receiving a bribe or illegal rebate—occasionally referred to as Wharton's Rule offenses—are in fact quite unlike dueling and adultery. It is possible to give something with criminal intent though it is received innocently, or to receive with criminal intent something that is given innocently. Thus, one may be convicted of the crime of receiving a bribe, for example, regardless of the intentions of the giver and without proof of an agreement. See, *e.g.*, *Ex parte*

be guilty of the substantive crime. But he would not be guilty of a conspiracy, because his partner would not have "shared in the guilty knowledge and design" (*Morrison* v. *California*, 291 U.S. 82, 93). It would, therefore, be possible to commit the substantive crime without a sufficient meeting of the minds to constitute a conspiracy.

O'Leary, 53 F. 2d 956 (C.A. 7), certiorari denied, 283 U.S. 830."

Although cooperative action would be required in the sense that one must give to or receive from another, that cooperation would not amount to a conspiracy unless both "shared in the guilty knowledge and design" (*Morrison* v. *California*, *supra*, 291 U.S. at 93). "[C]onspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of both" (*id.* at 92). Conviction of conspiracy, therefore, would require proof of an additional element not essential for conviction of receiving the bribe, and the two offenses may be punished separately. Cases such as *United States* v. *Sager*, 49 F. 2d 725 (C.A. 2) (conspiracy to bribe a juror), and *United States* v. *New York Cent. & H. R. R. Co.*, 146 Fed. 298 (C.C. S.D. N.Y.), affirmed with respect to other issues, 212 U.S. 481, 500 (conspiracy to give and receive an illegal rebate), in which Whar-

[11] Where a statute made it a crime for a Congressman or federal officer to "receive or agree to receive any compensation * * * for any services rendered * * * in relation to any proceeding * * * in which the United States is a party," this Court held that a defendant could properly be charged, convicted, and punished separately for receiving the illicit compensation and for agreeing to do so. *Burton* v. *United States*, 202 U.S. 344. The Court stated (202 U.S. at 377):

"It was certainly competent for Congress to make the agreement to receive, as well as the receiving of, the forbidden compensation separate, distinct offenses. * * * There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. * * *"

ton's Rule was applied in circumstances like these, are, we submit, wrongly decided.[16]

[16] A corollary of Wharton's Rule, however, might preclude cumulative punishment where an agreement by itself—without an overt act—constitutes the substantive crime. The federal bribery statute, for example, makes it a crime for a public official, *inter alia*, to "agree to receive anything of value * * * in return for * * * being influenced in his performance of any official act" (18 U.S.C. 201(c)). A public official who agreed with another person to receive a bribe from him could be convicted under that statute without proof that either party committed an overt act in furtherance of the agreement. If both parties entered into the agreement with guilty knowledge and if either one committed an overt act, then each would be guilty as well of conspiracy. The conspiracy in these circumstances would necessarily include the agreement to receive the bribe. The imposition of cumulative punishment upon a conviction for both offenses would therefore be impermissible.

This corollary rule is occasionally confused with Wharton's Rule, which applies where the conspiracy is necessarily included within the substantive offense, and, like Wharton's Rule, it is occasionally misunderstood. In *United States* v. *Dietrich*, 126 Fed. 664 (C.C. D. Neb.), for example, a United States Senator and another person were charged with conspiracy to violate the former bribery statute. The indictment alleged that the Senator had agreed with his co-defendant "to take and receive" (*ibid.*) a sum of money from the co-defendant for procuring an appointment as postmaster for the co-defendant. It also alleged that the co-defendant committed an overt act in furtherance of the agreement. If the substantive offense of agreeing to receive a bribe had also been charged, the Senator could not have received cumulative sentences for the two crimes. Since only the conspiracy had been charged, however, neither Wharton's Rule nor its corollary should have been applied. The court nevertheless erroneously concluded that Wharton's Rule was applicable and that the indictment must be dismissed. (As we show later in this brief (pp. 43–53, *infra*), it would have been improper in any event to dismiss the indictment even if the substantive crime had also been charged.)

B. WHARTON'S RULE DOES NOT PRECLUDE SEPARATE PUNISHMENT FOR A VIOLATION OF 18 U.S.C. 1955 AND A CONSPIRACY TO COMMIT THAT OFFENSE, BECAUSE IT IS POSSIBLE TO COMMIT THE SUBSTANTIVE CRIME WITHOUT CONSPIRING TO DO SO; THE PUNISHMENT PROVIDED BY CONGRESS FOR A VIOLATION OF SECTION 1955 DOES NOT INCLUDE PUNISHMENT FOR A CONSPIRACY

Petitioners' contentions in this case are founded upon a fundamental misconception concerning the proof required for conviction under 18 U.S.C. 1955. The statute provides that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business" shall be fined or imprisoned. It defines "illegal gambling business" as a gambling business which violates state law, operates for more than 30 days or has gross revenues of $2,000 in a single day, and "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business * * *."

Petitioners claim, in effect, that the offense defined by Section 1955, like the crime of dueling, necessarily includes a conspiracy to commit it and that Wharton's Rule is therefore applicable. Petitioners reason as follows. "In order to satisfy the statutory requirements of § 1955 a minimum of five must be intentional participants in an illegal gambling *enterprise*. If a minimum of five persons wilfully cooperate in such an illegal enterprise they must have done so by means of some agreement however tacit that may have been. Whatever the nature of the agreement of the five or more persons contemplated by § 1955, it is, in essence, a conspiracy" (Br. 6). Since, therefore, "[t]he very nature of § 1955 requires a conspiracy of a minimum of five" persons (Br. 17), it follows that "[t]here

is no element in the conspiracy that is not present in the substantive offense" (Br. 15).

The argument rests upon a faulty premise. The statute does not provide that each of the requisite five persons must be "intentional participants" who "wilfully cooperate in such an illegal enterprise" (Br. 6). The defendant himself, of course, must be shown to have had guilty knowledge or criminal intent, but it is no part of the proof required by Section 1955 that the other participants in the business also had criminal intent or that they were party to a corrupt agreement with the defendant. It is enough to prove that at least four other persons, even innocent persons, were involved in the conduct of some part of the business. The state of their minds and the extent of their knowledge are immaterial to the defendant's guilt or innocence.

Suppose, for example, that the government's evidence showed the following facts. A bookmaker employs a group of ten high school students on a part-time basis to answer telephones for him. He explains to each that the business involves sensitive market research assignments, that field workers will call to report over the telephone certain coded polling and census information, and that each student should simply write down the caller's name and the precise numbers he reports. None of the students is aware that the operation involves bookmaking.

On these facts, assuming that the operation violated state law and that it had sufficient daily gross revenues to satisfy Section 1955, would the bookmaker be entitled to a judgment of acquittal because the evi-

dence failed to show that the students had criminal intent? We think not. The proof would be sufficient to show that the bookmaker was conducting an illegal gambling business. It would also be sufficient to show that the business "involves five or more persons who conduct * * * part of such business" (18 U.S.C. 1955(b)(1)(ii))."

Section 1955 was enacted as part of Title VIII of the Organized Crime Control Act of 1970. Although Congress found that "illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof" (84 Stat. 922, 936), it determined "not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions" (H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 53). It therefore prohibited only those illegal gambling enterprises that involve five or more persons and that operate for more than 30 days

[17] Answering telephones in a bookmaking operation would be conducting part of the business within the meaning of Section 1955. "Congress' intent was to include all those who participate in the *operation* of a gambling business, regardless how minor their roles and whether or not they be labelled agents, runners, independent contractors or the like, and to exclude only customers of the business" (*United States* v. *Becker*, 461 F. 2d 230, 232 (C.A. 2), vacated and remanded on other grounds, May 28, 1974, No. 72-158; emphasis in original). See also *United States* v. *Harris*, 460 F. 2d 1041, 1049-1050 (C.A. 5), certiorari denied, 409 U.S. 877; *United States* v. *Palmer*, 465 F. 2d 697, 699 (C.A. 6), certiorari denied, 409 U.S. 874; *United States* v. *Meese*, 479 F. 2d 41, 43 (C.A. 8); *United States* v. *Sacco*, 491 F. 2d 995, 1001-1003 (C.A. 9, *en banc*) ("Each person, whatever his function, who plays an integral part in the maintenance of illegal gambling, conducts an 'illegal gambling business' and is included within the scope of § 1955").

or have gross revenues of more than $2,000 in a single day. These requirements were designed to ensure that federal prosecutions are limited to gambling operations of a size and scope sufficient to warrant the allocation of federal law enforcement and prosecutorial resources.[18]

One criterion established by the statute to determine whether a particular gambling operation is large enough to come within the scope of its prohibition is the number of persons involved. If five or more are involved, that statutory standard is satisfied; there is no further requirement that each of the participants be shown to have acted with criminal intent.

It is true that Section 1955 uses the same words—"conducts, finances, manages, supervises, directs, or owns"—in defining the prohibited conduct and in stating the nature of the participation required by five or more persons, and there is nothing to suggest that Congress intended to depart from "the central thought that wrongdoing must be conscious to be criminal" (*Morissette* v. *United States*, 342 U.S. 246, 252). The ten innocent students, therefore, would not themselves be guilty of the crime even though by their acts they conducted part of the gambling business. No such implied element of scienter, however, must or should be

[18] Although the statute requires the participation of only five persons in the gambling business, Congress "anticipated that cases in which this standard can be met will ordinarily involve business-type gambling operations of considerably greater magnitude" (S. Rep. No. 91-617, 91st Cong., 1st Sess., p. 73). It did not establish a higher minimum, however, because it recognized that "it is usually possible to prove only a relatively small proportion of the total operations of a gambling enterprise" (*ibid.*).

read into the same words when they are used to establish a threshold requirement relating to the operation's size and scope.

Indeed, had Congress intended to require proof that at least five participants in the operation were criminally culpable, it could have avoided repetition of the words used to describe the participation. Section 1955 could have been written in the same form as the general conspiracy statute, 18 U.S.C. 371,[19] to provide that "if *five or more persons* conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business, *each* shall be fined or imprisoned." We think it is significant, therefore, that Congress chose the form it did. By providing that any person who conducts an illegal gambling business involving five or more persons shall himself be guilty of the offense, Congress left open the possibility of prosecuting a lone violator where the evidence shows that he operated a large enough business to justify federal concern but that his workers were unaware of the nature of the business they were conducting.

If we are correct in our view that the culpability of the other participants in the gambling operation is immaterial to the guilt or innocence of a defendant charged under Section 1955 with conducting an illegal gambling business, then it follows that Wharton's Rule is inapplicable in this case. The standard, again, is whether it is "impossible under any circumstances" to commit the substantive offense without cooperative

[19] Section 371 provides that, "[i]f two or more persons conspire * * * to commit an offense against the United States, * * * each shall be fined * * * or imprisoned * * *."

action amounting to a conspiracy (*Gebardi* v. *United States, supra,* 287 U.S. at 122). As we have just shown, it is possible to commit the crime of conducting an illegal gambling business without also conspiring to do so.

The bookmaker who hires ten innocent students to answer his telephone would be guilty of the substantive crime. But he would not be guilty of conspiring with them to commit the offense, "however guilty his own state of mind, unless [they] had shared in the guilty knowledge and design" (*Morrison* v. *California, supra,* 291 U.S. at 93). Conspiracy requires proof of "a corrupt agreement between not less than two with guilty knowledge on the part of each" (*id.* at 92). On the facts we have hypothesized, the students would not have the requisite knowledge, and neither they nor the bookmaker could be convicted of a conspiracy. Petitioners are incorrect, therefore, in stating that "[w]hatever the nature of the agreement of the five or more persons contemplated by § 1955, it is, in essence, a conspiracy" (Br. 6). The agreement between the bookmaker and each of his ten student employees is not a conspiracy because only the bookmaker has corrupt intentions.

The conspiracy, therefore, is not necessarily included within the substantive offense; it requires proof of a fact—*i.e.,* the existence of a corrupt agreement—not essential for conviction of the substantive crime.[20] Each offense may therefore be punished

[20] As the Fourth Circuit stated in *United States* v. *Bobo, supra,* 477 F. 2d at 987: "A gambling business, the operation of which is made unlawful by § 1955, may be operated without

separately. Since the conspiracy is not necessarily included within the crime of conducting an illegal gambling business, there is no basis for any presumption that Congress intended the punishment for the gambling offense to include punishment for a conspiracy to commit it.[21] Quite the contrary is true. Since the crime could be committed without a conspiracy, the "collective criminal agreement" (*Callanan* v. *United States, supra,* 364 U.S. at 593) involved in a conspiracy would be an aggravating factor for which separate punishment might be appropriate.

The situation here is therefore similar to that in *Pereira* v. *United States,* 347 U.S. 1. The two defendants in that case were charged with using the mails pursuant to a scheme to defraud (18 U.S.C. 1341), transporting securities in interstate commerce knowing them to have been obtained by fraud (18 U.S.C. 2314), and conspiring to commit those offenses (18 U.S.C. 371). The proof showed that the two defendants planned and executed an elaborate "confidence game" in order fraudulently to obtain money from a wealthy widow. They argued that "their conviction on both the substantive counts and a conspiracy to commit the crimes charged in the substantive counts constitutes double jeopardy" (347 U.S. at 11).

the agreement of the minimum of five persons involved. The five persons need make no agreement; all they need to be is involved. * * *"

[21] A violation of 18 U.S.C. 1955 is punishable by a fine of not more than $20,000 or imprisonment for not more than five years or both. A violation of 18 U.S.C. 371 is punishable by a fine of not more than $10,000 or imprisonment for not more than five years or both.

The Court rejected that contention on the basis of reasoning that applies as well to petitioners' contentions in this case. "Only if the substantive offense and the conspiracy are identical," the Court stated, "does a conviction for both constitute double jeopardy" (*ibid.*). Unlike a conspiracy, however, "[t]he substantive offenses with which petitioners were charged do not require more than one person for their commission; either could be accomplished by a single individual" (*ibid.*). Moreover, "[t]he essence of the conspiracy charge is an agreement," whereas "conviction on the substantive counts does not depend on any agreement" (*ibid.*). "Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical" (*id.* at 11–12).[22]

[22] The lower federal courts have also frequently refused to apply Wharton's Rule where the substantive offense could be committed by one person alone and where conviction of the offense does not depend upon proof of a corrupt agreement among the participants. See, *e.g.*, *United States* v. *Parzow*, 391 F. 2d 240, 241 (C.A. 4) (conspiracy to use a facility in interstate commerce to facilitate the bribery of a public official); *Pifer* v. *United States*, 245 F. 2d 704, 705 (C.A. 4) (conspiracy to escape from federal custody); *United States* v. *Klock*, 210 F. 2d 217, 224 (C.A. 2) (conspiracy to misapply bank funds and to make false entries in bank books); *United States* v. *Cordo*, 186 F. 2d 144, 147 (C.A. 2), certiorari denied *sub nom. Minkoff* v. *United States*, 340 U.S. 952 (conspiracy to receive and possess goods stolen from interstate commerce); *United States* v. *Winters*, 158 F. 2d 674, 675 (C.A. 2) (conspiracy to steal goods moving as part of an interstate shipment); *Curtis* v. *United States*, 67 F. 2d 943, 947 (C.A. 10) (conspiracy to make false entries in bank books); *Lisansky* v. *United States*, 31 F. 2d 846, 848–850 (C.A. 4), certiorari denied, 279 U.S. 873 (conspiracy to defraud the United States of income taxes due by filing false partnership tax return); *Laughter* v. *United States*, 259 Fed. 94, 97–98 (C.A. 6), certiorari denied, 249 U.S. 613 (conspiracy to cause intoxicating liquors to be transported in interstate commerce into a prohibition state); *Chadwick* v. *United States*, 141 Fed. 225, 236–237 (C.A. 6) (conspiracy to certify a check in the absence of sufficient funds).

As *Pereira* makes clear, the critical determination is whether the substantive offense "*could* be accomplished by a single individual" without a conspiracy (*id.* at 11; emphasis added), not whether it was *in fact* accomplished without a conspiracy. The proper focus is upon the statutory definition of the crime, not upon the government's theory of the particular case. See *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788–789.

C. WHARTON'S RULE IS ALSO INAPPLICABLE TO THE PRESENT CASE BECAUSE THE INDICTMENT CHARGED AND THE EVIDENCE SHOWED THAT THE CONSPIRACY INVOLVED MORE PERSONS THAN THE MINIMUM NUMBER NECESSARY TO COMMIT THE SUBSTANTIVE OFFENSE

Even if Section 1955 were construed to require proof that each of at least five participants in the gambling business "shared in the guilty knowledge and design" (*Morrison* v. *California*, *supra*, 291 U.S. at 93), so that a conspiracy among five persons would be necessarily included within the substantive crime, a traditional exception to Wharton's Rule would nevertheless permit separate punishment for the two offenses in this case. The exception provides that a conspiracy to commit a Wharton's Rule offense may be punished separately if "it contemplated the co-

operation of a greater number of parties than were necessary to the commission of the principal offense" (*Gebardi* v. *United States, supra,* 287 U.S. at 122, n. 6). See 1 Anderson, *Wharton's Criminal Law and Procedure, supra,* § 89, p. 193; Note, *Developments in the Law-Criminal Conspiracy,* 72 Harv. L. Rev. 920, 955–956 (1959).

The exception is fully consistent with the purpose of the rule itself. Multiple punishment is precluded under Wharton's Rule on the assumption that Congress took into consideration, in prescribing the punishment for the substantive crime, the dangers involved in any necessarily included combination of minds for a criminal purpose. When the combination includes more persons than the minimum number required to commit the substantive offense, however, the dangers of the conspiracy may be increased over those that are necessarily involved in commission of the principal offense. The presence of additional minds may facilitate the commission of the substantive offense and make more likely the commission of unrelated crimes. It should not be presumed, therefore, that the legislature intended to exclude punishment for the larger combination.

In the present case, the indictment charged that 25 persons (including 11 unindicted co-conspirators) had conspired to conduct an illegal gambling business in violation of 18 U.S.C. 1955 (A. 15). The jury found eight of those persons guilty of the conspiracy and of its substantive aim. Even if—contrary to our contention—Section 1955 is read as necessarily including a five-person conspiracy, it does not necessarily include

an eight-person conspiracy. Since the larger combination of minds carries with it a greater danger to society, separate punishment for the conspiracy is justified. This is the basis upon which the court of appeals rested its decision in the present case (Pet. App. 24a). See also *United States* v. *Becker, supra,* 461 F. 2d at 234.

In *United States* v. *Hunter,* 478 F. 2d 1019, certiorari denied, 414 U.S. 857, the Seventh Circuit applied Wharton's Rule to a case in which 14 persons were charged with conspiring to conduct an illegal gambling business. The court rejected the government's contention that the case fell within the exception to Wharton's Rule; that argument, the court stated, "merely emphasizes the number of persons charged in the indictment" and "does not identify an element of each offense which adequately differentiates the other" (478 F. 2d at 1026). Although 14 persons were alleged to have participated in the conspiracy, that charge "comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself" (*ibid.*).

The conspiracy charge, however, does comprehend something more than the agreement inherent in the substantive crime. It requires proof that at least six persons were part of the conspiracy, whereas the participation of only five would be sufficient for conviction of the substantive crime. That additional element makes the conspiracy separately punishable for the same reasons that a conspiracy of two is separately punishable when the substantive crime can be committed by one.

The exception is most often applied where the additional conspirators are "third parties" who have not themselves participated in the commission of the substantive offense, such as where a matchmaker conspires with a man and a woman for the commission of adultery by them. See *United States* v. *Figueredo*, 350 F. Supp. 1031, 1035 (M.D. Fla.), reversed *sub nom. United States* v. *Vaglica*, 490 F. 2d 799 (C.A. 5), pending on petition for a writ of certiorari *sub nom. Scaglione* v. *United States*, No. 73-1503. The rationale of the exception, however, does not require a different result where all the conspirators also participate in the commission of the substantive offense. In both situations, the conspiracy is separately punishable because it involves a larger combination and therefore is more dangerous than the combination necessarily included within the substantive crime. Contrary to the reasoning of the district court in *Figueredo*, *supra*, 350 F. Supp. at 1035, it is the number of persons involved in the conspiracy, not the nature of their involvement, that determines whether the exception applies.

An agreement between two persons to engage in a duel or to commit adultery would pose no danger beyond what is inherent in the commission of the substantive crime. But a joint agreement among 30 persons to engage in a series of duels or to conduct an adulterous orgy would pose a greater danger to the interests fostered by the statutory prohibition. Though the example is an awkward one, it illustrates the point that the presence of additional conspirators may enhance the criminal threat of an otherwise

relatively innocuous combination, even though the additional conspirators are also participants in the substantive offense.

Thus, in *United States* v. *Benter*, 457 F. 2d 1174 (C.A. 2), the court correctly concluded that the exception to Wharton's Rule should be applied where a government employee conspired with four persons to receive a bribe from them.[23] Although the other four might each be characterized as participants in the substantive crime as givers of the bribe, the court found the exception applicable because "the agreement involved more participants than were necessary for the commission of the substantive offense" (457 F. 2d at 1178).[24]

D. THE RULE OF LENITY DOES NOT PRECLUDE SEPARATE PUNISHMENT FOR THE TWO OFFENSES IN THIS CASE

Petitioners invoke this Court's "rule of lenity" (*Gore* v. *United States*, 357 U.S. 386, 391) in support

[23] As we have indicated (pp. 24-26, *supra*), we believe that Wharton's Rule is inapplicable in any event to the crime of receiving a bribe, because that offense does not logically include a conspiracy.

[24] There are decisions reaching the opposite result on similar facts. See, *e.g.*, *United States* v. *Sager*, *supra*, 49 F. 2d at 728-729 (conspiracy by three persons to bribe a juror); *United States* v. *Hagan*, 27 F. Supp. 814 (W.D. Ky.) (conspiracy among three persons to harbor two of them as fugitives from justice); *United States* v. *New York Cent. & H. R. R. Co.*, *supra*, 146 Fed. at 304 (conspiracy among several givers and several receivers of an illegal rebate). These decisions, we submit, are inconsistent with the rationale of Wharton's Rule and its exception. Moreover, "insofar as these decisions are based upon agency doctrines, the increased danger from the additional minds should lead to the rejection of agency doctrines in such situations" (Note, *supra*, 72 Harv.L.Rev. at 956).

of their argument that separate punishment should not be permitted for a violation of Section 1955 and a conspiracy to commit it. But the rule of lenity applies only in limited circumstances not present in this case.

The "policy of lenity," this Court has explained, "means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended" (*Ladner* v. *United States,* 358 U.S. 169, 178). "The rule comes into operation [only] at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers" (*Callanan* v. *United States, supra,* 364 U.S. at 596). It "only serves as an aid for resolving an ambiguity; it is not to be used to beget one" (*ibid.*).

The policy of lenity has been invoked by this Court in two situations. First, where a statute and its legislative history are "unclear as to the appropriate unit of prosecution" (*ibid.*), the "doubt will be resolved against turning a single transaction into multiple offenses" (*Bell* v. *United States,* 349 U.S. 81, 84). On that basis, the Court has held that the simultaneous transportation for immoral purposes of more than one woman in the same vehicle is a single violation of the Mann Act (*Bell* v. *United States, supra*); that the wounding of two federal officers by a single discharge of a gun constitutes only one offense (*Ladner* v. *United States, supra*); and that an employer whose illegal policy results in a series of violations of the

minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act commits only a single criminal offense (*United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218).

Second, the rule has been applied in the context of the bank robbery statute to preclude separate punishment for a single course of conduct violating more than one provision of the statute. Thus, robbing a federally insured bank and entering the bank with intent to commit a felony are not "consecutively punishable in a typical bank robbery situation," because the "mental element" of intent to steal "merges into the completed crime if the robbery is consummated" (*Prince* v. *United States,* 352 U.S. 322, 324, 328). See also *Heflin* v. *United States,* 358 U.S. 415 (robbing a federally insured bank and receiving the proceeds of the robbery are not separately punishable).

A different result was reached, however, in *Gore* v. *United States, supra,* where the Court upheld consecutive prison sentences for a single sale of narcotics that violated three separate provisions of the federal narcotics laws. "Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws," the Court stated, and there is no need for recourse to the rule of lenity where there have been "three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with * * * the traffic in narcotics" (357 U.S. at 391).

Moreover, where there is doubt concerning the intention of Congress with respect to the punishment of a substantive offense and the conspiracy to commit

it, the rule of lenity gives way to a contrary presumption that reflects the historic distinctiveness between the two crimes. Thus, in *Callanan* v. *United States*, *supra*, the defendant argued that Congress did not intend to subject him to separate punishment for obstructing interstate commerce by extortion and for conspiring to do so, because both of those offenses were created by the same section of the statute (18 U.S.C. 1951). The Court held, however, that a conspiracy and its substantive aim have always been viewed as separate crimes subject to separate punishment and that Congress should be presumed to have intended the usual punitive consequences of that distinction.

The Court stated, quoting from *United States* v. *Rabinowich*, *supra*, 238 U.S. at 88, that "[w]e attribute 'to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different * * *'" (364 U.S. at 594). As separate crimes, the conspiracy and the substantive offense are ordinarily punishable separately. "To dislodge such conventional consequences in the outlawing of two disparate offenses, conspiracy and substantive conduct, and effectuate a reversal of the settled interpretation * * * would require specific language to the contrary" (*id.* at 595).

The Court also specifically rejected a contention that the rule of lenity required a different result. Referring to its prior decisions in which it followed a policy of lenity to resolve doubts concerning the legislative purpose, the Court stated (*id.* at 597):

> Here we have no such dubieties within the statute itself. Unlike all of these cases, the problem before us does not involve the appropriate unit of prosecution—whether conduct constitutes one or several violations of a single statutory provision—nor is it an open question whether conspiracy and its substantive aim merge into a single offense. This is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components.

The present case is controlled by *Callanan*. If, as we have shown, a conspiracy is not necessarily included within the substantive offense defined by Section 1955, then Congress should be presumed to have intended that the commission of the substantive offense and a conspiracy to commit it would be separately punishable. As in *Callanan*, the petitioners here have been convicted of committing "two historically distinctive crimes composed of differing components" (*ibid.*), and there is no ambiguity that compels recourse to the rule of lenity.

II

EVEN IF WHARTON'S RULE WERE APPLICABLE TO THIS CASE, IT WOULD SIMPLY PRECLUDE CUMULATIVE PUNISHMENT; A NEW TRIAL WOULD NOT BE REQUIRED

If the Court determines, contrary to our contentions, that Section 1955 necessarily includes a conspiracy and that the exception to Wharton's Rule is not applicable in the circumstances of this case, then it must also consider petitioners' contention that the Court should reverse their convictions not only on the conspiracy count but also on the Section 1955 count

and should remand the case for a new trial. Petitioners reason that, "[i]f conspiracy to violate § 1955 is not a separate crime and separately punishable, there is no justification for submitting it to the jury" (Br. 24). By instructing the jury on a conspiracy for which petitioners could not be separately punished, they claim, the district court "permitted the jury to consider the guilt of the defendants by evidentiary standards which were fundamentally erroneous and incurably prejudicial" (Br. 25).

1. Petitioners' argument rests on the unstated premise that one may not be punished for a conspiracy to conduct an illegal gambling business not only when the substantive offense has been consummated, but also when there has been a conspiracy but no consummation of the substantive offense. Their claim is thus equivalent to an assertion that the conspiracy count should have been dismissed prior to trial because, under Wharton's Rule, there is no such offense as a conspiracy to conduct an illegal gambling business.[25]

We recognize that Wharton's Rule is frequently stated in a way that would appear to support petitioners' reasoning. Under Wharton's own formulation, the consequence of the rule's application is that "conspiracy * * * cannot be maintained" (Wharton, *supra*, § 1604, p. 1862). Thus, in *Gebardi* this Court referred to the rule as providing that, where the substantive offense presupposes "cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy"

[25] Indeed, petitioners did seek dismissal of the conspiracy count prior to trial (see Pet. App. 18a–20a).

(287 U.S. at 122). See also *Pinkerton* v. *United States, supra,* 328 U.S. at 643 (where the rule applies, "a conspiracy charge may not be added to the substantive charge"); *United States* v. *Katz, supra,* 271 U.S. at 355; *United States* v. *Holte, supra,* 236 U.S. at 145. We are also aware that the rule has in fact been applied on occasion to dismiss a conspiracy count joined with a substantive count or even a conspiracy count standing alone.

But we know of no case in which the result has been satisfactorily explained. The courts have simply invoked the traditional Wharton's Rule formulation without considering whether the rule's rationale requires the result apparently called for by the formulation. Only Wharton himself attempted to rationalize a dismissal of the conspiracy count, and that rationalization is unpersuasive. In support of his view that "conspiracy * * * does not lie" for concerted criminal action that is essential to commission of the substantive offense, Wharton stated: "* * * when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—*e.g.*, adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy" (Wharton, *supra*, § 1604, p. 1862).

This reasoning—which the courts have for years accepted uncritically—appears to rest upon a misreading of an 1850 decision that is generally regarded as

the first application of the rule that now bears Wharton's name. In *Shannon* v. *Commonwealth*, 14 Pa. 226, the defendants had been acquitted on a charge of adultery and were then indicted on a charge of conspiracy to commit the same adultery. The court held that the conspiracy indictment was barred on the ground that it "put the parties twice in jeopardy" for the same offense (14 Pa. at 227). "It is impossible to lay down a rule for all cases; but it may be said that where concert is a constituent part of the act to be done, as it is in fornication and adultery, a party acquitted of the major cannot be indicted of the minor. * * * [A]n indictment for the substance of the same thing in another form might be made a means of oppression" (*id.* at 227–228).

Assuming that the agreement of both partners was in fact an element of the adultery offense in Pennsylvania (see p. 23 and n. 14, *supra*), the decision was probably a correct application of the double jeopardy principle that precludes prosecution for an included offense after acquittal of the greater offense. See *Grafton* v. *United States*, *supra*, 206 U.S. at 349–352. The court in *Shannon* went beyond what was necessary to decide the case, however, to ridicule the notion that "an appointment for the indulgence of a passion or the gratification of a desire" should be the subject of criminal prosecution (14 Pa. at 228). "When an adulterous enterprise has been relinquished * * * it is impossible to believe that society has been so scathed by it, as to admit of no propitiation for it but public castigation" (*ibid.*). "[N]othing is more

ridiculous than a conspiracy to commit adultery" (*id.* at 227).

From these essentially gratuitous remarks, the Reporter inferred that the decision stood for these broad propositions: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act. There is no such offence as a conspiracy between a man and a woman to commit adultery" (Syllabus, *id.* at 226).

It was the Reporter's elaboration of the *Shannon* court's dicta, rather than the narrow holding of the case, on which Wharton apparently based the formulation of his rule. He stated, in effect, that, when conspiracy is necessarily included within a substantive offense, there can be no indictment for the conspiracy, at least where the substantive crime has been consummated, because in those circumstances there is no separate offense of conspiracy.

That Wharton's statement of the rule has found acceptance for so long attests, we submit, not to the essential soundness of his reasoning, but rather to the general influence of his treatise and its capacity to elevate a questionable principle to the status of an "established rule." As Mr. Justice Holmes reminded, however: "To rest upon a formula is a slumber that, prolonged, means death" (*Collected Legal Papers*, p. 306 (1921), quoted in *Callanan* v. *United States*, *supra*, 364 U.S. at 596).

In this case the formula should be discarded. As we have shown, Wharton's Rule, properly understood, is simply an application to conspiracy prosecutions of the more general rules with respect to greater and

necessarily included offenses. We submit that, when a substantive offense necessarily includes a conspiracy, an indictment charging a conspiracy to commit that offense should be treated in the same manner as an indictment charging any other offense that is included within some greater crime.

A charge of assaulting a federal officer (18 U.S.C. 111), for example, is not invalid merely because it is included within the greater crime of assaulting a federal officer with the use of a deadly weapon (*ibid.*). To apply Wharton's reasoning in this context would lead to the preposterous result that an indictment charging the lesser offense must be dismissed because the law separately proscribes the same conduct when it involves the use of a deadly weapon. The fact that the legislature has defined a greater crime does not mean that a person may not be indicted for a separate crime included within it. And that is as true with respect to conspiracies as it is with respect to assaults upon federal officers.

Nor is it improper to charge both the substantive offense and a necessarily included conspiracy in the same indictment. Even when an indictment is "multiplicitous" because it charges the *same* offense in more than one count, the multiplicity "is not fatal and does not require dismissal of the indictment" (1 Wright, *Federal Practice and Procedure* § 145, p. 336 (1969)).[26] The same is true where an indictment

[26] That is so, Professor Wright explains, because "[t]he principal danger in multiplicity is that defendant will be given multiple sentences for the same offense" (§ 145, p. 336). Since multiple sentences would be illegal and therefore subject to correction at any time under Rule 35, Fed.R.Crim.P., the

charges a greater offense and an included offense in separate counts. *Ekberg* v. *United States, supra,* 167 F. 2d at 385 (C.A. 1).

In that event, however, the trial court would ordinarily instruct the jury to consider the greater offense first and to consider the included offense only if it finds that the defendant is not guilty of the greater crime. *Fuller* v. *United States,* 407 F. 2d 1199, 1227, 1230 (C.A. D.C., *en banc*), certiorari denied, 393 U.S. 1120; 1 Devitt and Blackmar, *Federal Jury Practice and Instructions,* § 17.11 (2d ed. 1970). Moreover, the included offense would not be submitted at all unless "the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater" (*Keeble* v. *United States,* 412 U.S. 205, 208). See also *Sansone* v. *United States,* 380 U.S. 343, 349–350; *Berra* v. *United States,* 351 U.S. 131, 134.[27]

defendant would not be prejudiced by a multiplicitous indictment, except perhaps in the unusual situation, not present here, when so many separate counts are alleged that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes" (*United States* v. *Mamber,* 127 F. Supp. 925, 927 (D. Mass.)). See also *United States* v. *Ketchum,* 320 F. 2d 3, 8 (C.A. 2), certiorari denied, 375 U.S. 905; *United States* v. *Klein,* 247 F. 2d 908, 919 (C.A. 2), certiorari denied, 355 U.S. 924; cf. *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 225.

[27] The same rules apply regardless of whether the included offense has been separately charged in the indictment. See *United States* v. *Harary,* 457 F. 2d 471, 478–479 (C.A. 2); Rule 31(c), Fed.R.Crim.P. Where an indictment charges only a substantive Wharton's Rule offense, therefore, either the defense or the prosecution should be entitled to a conspiracy instruction if the evidence permits it. This would be an exception

Thus, contrary to petitioners' contention, there *is* a justification for submitting the included offense to the jury even though the defendant could not be punished cumulatively for the greater crime and the one included within it. The justification is that the jury may find the evidence insufficient with respect to the greater offense but sufficient with respect to the included offense. If, for example, a defendant were charged in separate counts with assaulting a federal officer and assaulting a federal officer with a deadly weapon, it would be appropriate to submit both counts to the jury—even though the defendant could not be given cumulative sentences on the two counts—if the evidence concerning the use of a deadly weapon were disputed. If that factual issue were resolved in the defendant's favor, the jury should still be free to consider whether he committed the assault without a deadly weapon.

Likewise, where an indictment charges the substantive offense of conducting an illegal gambling business together with a conspiracy to commit that crime—and if it is assumed that the conspiracy is necessarily included within the substantive offense—the proper procedure would be to submit both counts to the jury if there were a dispute over some element of the sub-

to the general rule that the conspiracy must be separately charged in the indictment (see *Pettibone* v. *United States*, *supra*, 148 U.S. at 202). If, pursuant to such an instruction, the jury finds the defendant guilty of conspiracy, the sentence would be limited to the maximum prescribed for conspiracy or, if conspiracy carries a heavier penalty, the maximum prescribed for the substantive offense. In the present context, a violation of Section 1955 is punishable more severely than a conspiracy to commit the violation (see note 21, *supra*).

stantive crime that is not required for conviction of the conspiracy—for example, the number of persons actually involved in the operation, the number of days it had been operated, or the amount of its revenues.[28] There would be no reason in such circumstances to immunize the defendant from punishment for a completed conspiracy merely because the substantive offense at which the conspiracy was aimed was never consummated."[29]

Even Wharton agreed that his rule should be applied only where the substantive crime has been con-

[28] The district court instructed the jury in this case that "[i]t would be theoretically possible * * * that if the business were underway and only reached a total of four, that there would be no violation of Section 1955, but there still could be a conspiracy charge on the part of those who planned the agreement to ultimately make a business of five, even though they never actually reached five" (A. 60).

Petitioners contend that the "fanciful hypothetical potential conspiracies the government may envision in aid of argument" (Br. 23–24) would not justify submitting both counts to the jury, because "[t]here has never been a federal prosecution for conspiracy to violate § 1955 which was not coupled with a prosecution for the violation of the substantive offense" (Br. 23). But the contention is a *non sequitur*. That grand juries have returned indictments charging both the substantive crime and a conspiracy to commit it does not mean that the evidence in all cases will be sufficient in the minds of petit jurors to warrant conviction of the substantive crime. The evidence may fall short on one element of the substantive offense even though it is sufficient to prove a conspiracy.

[29] "That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it. * * * [Wharton's] rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime" (A.L.I., *Model Penal Code*, Tent. Draft No. 10, Comment on § 5.04(2), p. 173 (1960)).

summated.[30] What he apparently failed to recognize is that the determination whether the crime *has* been consummated is for the jury to make. One cannot say with assurance prior to a verdict whether the evidence will result in a conviction of the substantive offense, and there is no reason to require the prosecution to elect at the time of indictment whether to prosecute the substantive crime or the conspiracy.

There is time enough after verdict to ensure that no impermissible double punishment is imposed. If the jury is properly instructed, it should return a verdict of guilty, if at all, on no more than one of the two counts. If it determines that the defendant is guilty of the substantive offense, it need not even consider the conspiracy charge, and if it determines that the defendant is guilty of a conspiracy, it must first have concluded that he is not guilty of the substantive crime. In either event, the verdict would present no opportunity to impose double punishment, because there would be only a single conviction.

But even if the jury ignores its instructions—or if the court gives improper instructions—and it returns a verdict of guilty on both counts, the error can be easily corrected at the time of sentencing or on appeal. The trial court may avoid double punishment by imposing sentence only on the substantive conviction, or by imposing a single general sentence, or perhaps by imposing concurrent sentences on the two counts.

[30] "Of course when the offense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable" (Wharton, *supra*, § 1604, p. 1862).

Ekberg v. *United States*, *supra*, 167 F. 2d at 385–386. In each case, the defendant would be subjected to no impermissible multiple punishment. Similarly, the appellate court could correct an illegal cumulative sentence either by vacating the sentence on the included offense or—if that would obviously frustrate the trial court's sentencing intentions—by vacating the sentences on both counts and remanding for resentencing.

2. The district court in the present case, because it concluded that Wharton's Rule was inapplicable, did not instruct the jury that it should consider the conspiracy count with respect to each defendant only if it determined that the defendant was not guilty of the substantive gambling offense. The jury, as a consequence, returned verdicts of guilty on both counts as to all eight petitioners. Each was sentenced to imprisonment and a subsequent period of probation on the Section 1955 count and to probation on the conspiracy count to run concurrently with the probation on the Section 1955 count. In the case of seven of the petitioners, however, the probation on the conspiracy count would extend for two years beyond the probation on the Section 1955 count (see note 3, *supra*). Their sentences on the two counts are, therefore, technically cumulative.

If this Court determines that Wharton's Rule is applicable, then the cumulative sentences cannot stand. We believe that the appropriate disposition in that event would be to vacate the judgment of the court of appeals and remand the case with directions to vacate

the sentences on the conspiracy count.[31] Since the district court imposed sentence principally on the Section 1955 count, and since those sentences would be unaffected, we think that this disposition would be consistent with the district court's sentencing intentions and would make it unnecessary to remand the case to that court for resentencing on the substantive count.

3. Even if petitioners were correct that the conspiracy count should not have been submitted to the jury in any form, a new trial would not be required. Vacating their conspiracy sentences would be a full remedy.

Petitioners claim that a new trial is required because the district court's instructions with respect to conspiracy permitted the jury to consider hearsay evidence that would not otherwise have been admissible with respect to the substantive count alone (Br. 20–22, 24, 25). That claim is incorrect for two reasons.

First, contrary to petitioners' suggestion, the exception to the hearsay rule for declarations of a co-conspirator made during the course of and in furtherance of the conspiracy is not limited to cases in which the indictment includes a formal charge of conspiracy. The rationale of that exception "is the notion that the conspirators are partners in crime" whom "the law deems * * * agents of one another"

[31] Petitioner Iannelli, whose probation on the conspiracy count is coextensive with his probation on the Section 1955 count, has made no showing that he would be prejudiced by the concurrent sentences. It may be appropriate, however, in the context of this case, to treat each of the petitioners in the same manner and to direct that his sentence on the conspiracy count be vacated also. See *Fuller* v. *United States*, *supra*, 407 F. 2d at 1233, n. 52.

(*Anderson* v. *United States*, No. 73-346, decided June 3, 1974, slip op. 6, n. 6). Declarations of one conspirator in furtherance of the conspiracy are thus admissible as against another member of the conspiracy for the same reason that "the declarations of an agent bind the principal * * * when the agent acts within the scope of his authority" (*ibid.*). The statements are admissible on the theory that they are "the statements of a party" (*Lutwak* v. *United States*, 344 U.S. 604, 617).

It follows that the existence of a conspiracy count in the indictment is not necessary for the application of the exception. See *St. Clair* v. *United States*, 154 U.S. 134, 149. "[I]t is enough if evidence, other than that whose admissibility is under challenge, disclosed" a conspiracy (*United States* v. *Annunziato*, 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919). Where there is such independent evidence of a joint venture in crime, the hearsay declarations of a co-conspirator are "admissible on substantive counts even when there is no conspiracy indictment at all" (*United States* v. *Costello*, 352 F. 2d 848, 854, n. 4 (C.A. 2), reversed on other grounds *sub nom. Marchetti* v. *United States*, 390 U.S. 39)."

[32] Accord, *Ottomano* v. *United States*, 468 F. 2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128; *United States* v. *Binder*, 453 F. 2d 805, 809 (C.A. 2), certiorari denied, 407 U.S. 920; *United States* v. *Berger*, 433 F. 2d 680, 683 (C.A. 2), certiorari denied, 401 U.S. 962; *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); *United States* v. *Olweiss*, 138 F. 2d 798, 800 (C.A. 2), certiorari denied, 321 U.S. 744; *United States* v. *Weber*, 437 F. 2d 327, 337, n. 11 (C.A. 3), certiorari denied, 402 U.S. 932; *United States* v. *Smith*, 343 F. 2d 847, 849–850 (C.A. 6); *United States* v. *Tanner*, 471 F. 2d 128, 143 (C.A. 7);

Moreover, the absence of a conspiracy count in the context of a Wharton's Rule prosecution would be purely a formal omission, since a Wharton's Rule offense necessarily includes a conspiracy within it. Even if a conspiracy charge were essential for application of the co-conspirator exception to the hearsay rule, that requirement would be satisfied by an indictment charging a Wharton's Rule offense.

The upshot is that the hearsay evidence of which petitioners complain would be no less admissible upon a retrial on the substantive count alone than it was in the first trial.

Second, the district court did *not* instruct the jury that it could consider the hearsay declarations with respect to the substantive count. Although the court should have permitted such consideration for the reasons we have indicated, it charged the jury instead that the statements of conspirators in furtherance of the conspiracy "would not be admissible in proving guilt under the second count [Section 1955], but it could be admissible under the circumstances I just enumerated with you in proving the guilt of conspiracy" (A. 61). There is no reason to believe that the jury ignored that explicit instruction.

United States v. *Mendell*, 447 F. 2d 639, 642 (C.A. 7), certiorari denied, 404 U.S. 991; *United States* v. *Schroeder*, 433 F. 2d 846, 849 (C.A. 8), certiorari denied *sub. nom. Allen* v. *United States*, 400 U.S. 1024; *United States* v. *Ushakow*, 474 F. 2d 1244, 1245 (C.A. 9); *United States* v. *Williams*, 435 F. 2d 642, 645 (C.A. 9), certiorari denied, 401 U.S. 995; *Mares* v. *United States*, 383 F. 2d 805, 809–810 (C.A. 10).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-64

ROBERT E. IANNELLI, ET AL., Petitioners

v.

UNITED STATES OF AMERICA

On Certiorari from the United States Court of Appeals
for the Third Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Solicitor General's tardiness in filing the Government's brief in this case is exceeded only by the length and complexity of his submission.

The Government, it would appear, would have this Court either totally abrogate Wharton's Rule or completely rewrite it, or, all else failing, restrict it to cases involving dueling. We submit that Wharton's Rule is not in need of radical surgery and requires nothing more than a logical application of its plain teaching to the facts of this case.

The Government argues that Wharton's Rule does not apply to this case for a variety of reasons and alternatively suggests that if it does apply it requires only the reversal of the conspiracy convictions and sentences and not a new trial. We disagree with the Government and thus briefly reply to its arguments.

I. The Applicability of Wharton's Rule to this Case.

A. The Government's Narrow Exception Argument

At the outset of its argument, the Government concedes that this Court, while never dealing with the direct application of Wharton's Rule, has indeed acknowledged its viability. (Goverment's Brief 16) It then goes on to concede that it is on common ground with us in that Wharton's Rule applies "where it is impossible under any circumstances to commit the substantive offense without cooperative action". At this point the Government begs leave to depart from the appellants' train of thought and launches into a lengthy discussion of the nature of conspiracy and the necessity for its separate punishment. We do not quarrel with the holding in *Callanan v. United States,* 364 U.S. 587, nor any of the other multitude of cases cited by the Government to the same effect. It is obvious that Wharton's Rule has no application to the vast majority of federal criminal violations.

The Government's laborious historical analysis of Wharton's Rule in the first section of its argument concludes that many of the courts that have followed Professor Wharton's Rule have been in error and suggests that the Professor himself may not have understood his teachings as well as the Government now does. Whether courts in the past have misinterpreted Wharton's Rule may be of some slight historical interest; its application to the present case is, however, of very real moment and thus the Government in the next section of its brief attempts to come to grips with the realities of this case.

B. The Government's Hypothetical Syndicate Argument

The Government has conceded that Wharton's Rule would clearly apply in this case if it would have been impossible for the appellants to commit the substantive offense without cooperative action. Since 18 U.S.C 1955 requires the interaction of five or more persons, the Government has vaulted this statutory hurdle by an heroic leap into the land of hypothetical fantasy. While conceding at p. 11 of its brief that it would be a rare case where fewer than two persons are charged with a knowing violation of 18 U.S.C. 1955, the Government at p. 28 of its brief has devised a hypothetical gambling syndicate which it argues will permit the conviction of only one person of the substantive offense.

The Government argues that if it is possible for the substantive crime to be committed by one person then Wharton's Rule can have no application. In demonstration of this argument the Government has hypothesized a gambling syndicate made up of one professional and ten high school students who think they are involved in a market research project. The ten high school students obviously could not be charged with conspiracy, but the Government urges that the professional gambler, who was their boss, could be convicted of the substantive violation of 18 U.S.C. 1955 if the operation grossed more than two thousand dollars on a given day or was in operation for more than thirty days. While this hypothetical situation is ingenious, it is better suited to the needs of the law school classroom than to the demands of practical judicial statutory construction.

Congress enacted 18 U.S.C. 1955 to cope with problems of organized crime and syndicated gambling as it

viewed the problem in 1970. The statute was designed to deal with real gambling syndicates, not imaginary syndicates devised by the staff of the Solicitor General. The appellants here have not been convicted in a hypothetical case involving high school students who thought they were doing market research; they have been convicted and sentenced for the violation of two federal statutes which by the clear language of the statutes themselves constituted the commission of only one crime.

The Government places great weight on the theory that if the crime *could* be committed by a single person without a conspiracy, then the defendant may be convicted and sentenced for violation of the conspiracy statute and the substantive statute. (Government Brief 39) It is respectfully submitted that we are not concerned here with imaginary possibilities but with actual reality. As we indicated in our initial brief there has never been a prosecution of a single individual for a violation of 18 U.S.C. 1955 in the absence of allegations of plurality of action by less than four other co-defendants or four other con-conspirators. (Appellant's Brief 23) Plurality of action was contemplated by Congress when it enacted 18 U.S.C. 1955 and was indeed required by the very language of the statute. It is precisely this plurality of action which causes the substantive violation to merge with the conspiracy charge and thus constitute a single indictable and punishable crime.

C. The Government's Numerical Mistake

In an effort to bring this case within an exception to Wharton's Rule the Government argues that, because there were more than five persons charged in the indictment, they may be punished separately for conspiracy and the substantive offense. In support of this proposition the Government argues that Congress may have intended a greater punishment for larger combinations of illegal minds. The first thing that is wrong with this argument is that it ignores what Congress said and did. In its brief the Government points out that Section 1955 was enacted "only to deal with illegal gambling activities of major proportions". (Government Brief 29) In dealing with gambling of major proportions Congress set certain minimum standards that had to be met in order to warrant federal prosecution. Among the requisite minimums set by Congress was the requirement that it: "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such a business". Congress made a combination of five or more the key to federal prosecution. It did not, however, create any greater penalties for illegal gambling syndicates involving five or five hundred persons.

Congress set the penalty for the gambler convicted under 18 U.S.C. 1955, and the only requirement it set that is relevant to this argument is that the person convicted be a part of a group of five or more. In order to be convicted of conspiracy under 18 U.S.C. 371 there must be two or more persons who conspire. Both statutes speak in terms of minimums. Neither statute provides greater penalties for defendants convicted as participants in large gambling syndicates or in large conspiracies.

The Government argues that Wharton's Rule does not apply if "it contemplated the cooperation of a greater number of parties than were necessary to the commission of the principal offense". (Government Brief 35, 36) It then goes on to argue that the larger the combination of minds the greater the danger to society and thus, the need for greater punishment. If this were so, Congress could have easily enacted greater penalties for participants in large conspiracies and large gambling syndicates; it has not chosen to do so, and we respectfully suggest that this Court should not do so either.

The simple fallacy of the Government's numbers argument is that it fails to take into account the gist of Wharton's Rule which is set forth in the Government's brief in its original form:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, * * * cannot be maintained. * * *"
> (Government Brief 15)

18 U.S.C. 1955 requires five or more persons to be involved in an illegal gambling enterprise. In this case the jury found that eight were so involved.

Wharton's Rule speakes only of a plurality of agents; the statute in question speaks only of a plurality of five or more. Since it is evident that the plurality required by the Rule and the plurality required by the statute were both fulfilled in this case, Wharton's Rule should now apply.

D. The Rule of Lenity Is Applicable Here

The Government takes the position that, in the absence of identifiable Congressional intent, the doctrine of lenity does not apply in this case. It is quite clear that Congress has enacted far more severe penalities for the substantive violation of 18 U.S.C. 1955 than it has for a violation of 18 U.S.C. 371. It seems to us that this, in and of itself, should be a clear indication that Congress did not intend double punishment for an agreement to engage in federally impermissible gambling and the subsequent substantive involvement therein. Whatever the Government's view of lenity may be, our view is in accord with the observation made by Judge Hand in 1925:

> "Furthermore, we think it is permissible to add that in our judgment it is only in very rare cases, of which this is not one, that the cumulation of sentences is proper, where the counts are for merely alternative forms of the same offense, and where a conspiracy count is added to a count for the substantive crime. It appears to us that the maximum sentence prescribed by Congress is intended to cover the whole substantive offense in its extremest degree, no matter in how many different ways a draughtsman may plead it, and even though he add a count for conspiracy, that darling of the modern prosecutor's nursery."

Harrison v. United States, 7 F. 2d 259, 263 (1925)

Since Congress saw fit to impose more stringent penalties for a violation of 18 U.S.C. 1955 than could be imposed under the general conspiracy statute, the doctrine of lenity should apply.

II. The Government's Procedural Argument.

The Government contends that even if Wharton's Rule does apply in this case a new trial should not be granted because the Rule only prevents multiple punishment for the same offense.

The Government of course concedes that this Court has on various occasions spoken of the Rule in such fashion as to support our theory. (Government Brief 44, 45) Simply restated, our theory is that if Wharton's Rule does apply here there is no logical reason to justify submitting the conspiracy count to the jury. The Government argues that such submission is really harmless because the trial court can straighten everything out in the end. The Government also suggests that this Court and others and perhaps even Professor Wharton himself have never really understood the true nature of the Rule.

If, in fact, the application of Wharton's Rule to a charge of conspiracy and the substantive violation of 18 U.S.C. 1955 precludes dual punishment for both violations, what logical justification can there be for requiring a jury to consider the possibility of the commission of two crimes when there is only one that is punishable? The justification for such procedure can only be supported by a desire to give the prosecution an unwarranted advantage. The mischief that such a course of action can create has been commented upon: "The vice of multiplicity is that it may lead to multiple sentences for the same offense, though for this there are remedies, and that 'the prolix pleading may have some psychological effect upon the jury by suggesting to it that defendant has committed not one but several

crimes.'" I Wright, *Federal Practice and Procedure* § 142, p. 311.

It has been frequently said that the law does not require a man to do a vain thing. If that old maxim is true, why then should a jury be charged and required to deliberate on the charge of conspiracy if the conspiracy is merged with the substantive offense? To argue, as the Government does, that the trial court can ultimately set everything right is an absurdly simplistic view of criminal justice. The function of federal criminal juries is not to ponder hypothetical situations but to make determinations involving the guilt or innocence of real defendants charged with actual punishable offenses. It is respectfully submitted that the proper function of a trial court is to initially prevent the interjection of extraneous and prejudicial elements from the jury's decisional process, not to attempt in the end result to filter the poison from a needlessly adulterated decison.

The jury in this case was required to determine the guilt or innocence of eight defendants charged with two crimes when there was in fact only one. It is easy to say in retrospect that whatever harm might have resulted can now be simply corrected by a judicial adjustment of punishment. The time for judicial adjustment was before the case was submitted to the jury. The defendants here had the right to have the jury consider their case in the light of the actual punishable crimes with which they were charged and free of extraneous considerations of the separate crime of conspiracy which, under the proper application of Wharton's Rule, was not a punishable offense at all. The actual prejudice resulting from this erroneous submission to the jury is impossible to determine at this time; post-mortem investigations

for traces of poison are frequently unrewarding. The probability of prejudice in this case, however, is real indeed and can be cured by the simplest and surest of all judicial remedies: the grant of a new trial.

CONCLUSION

In spite of the Government's contentions that Wharton's Rule has in the past been misunderstood by the courts and was never really understood by its own formulator, there is still life in its logic. Professor Wharton would never have dreamed of the type of statutory scheme contemplated by 18 U.S.C. 1955 and probably the drafters of § 1955 never heard of Francis Wharton, yet his rule and § 1955 were made for each other. The collective action required by the conspiracy statute and § 1955 make the two crimes indistinguishable and thus they merge. This merger not only prohibits dual punishment for a conviction of conspiracy and the substantive offense but also prohibits submission to the jury separate counts of conspiracy and violation of § 1955.

For all of the reasons set out here and in our initial brief, the judgment of the Court of Appeals should be reversed.

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